

# Not for Publication or Citation

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN RE: CASE NO. 08-13109	)	
	)	
JUSTIN LEE STUCKEY	)	
TERESA ROSE STUCKEY	)	
	)	
Debtors	)	
	)	
	)	
JAMES CRAVER	)	
JANE CRAVER	)	
	)	
Plaintiffs	)	
	)	
vs.	)	PROC. NO. 09-1046
	)	
JUSTIN LEE STUCKEY	)	
TERESA ROSE STUCKEY	)	
	)	
Defendants	)	

**DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT  
AND MOTION FOR SANCTIONS**

At Fort Wayne, Indiana, on April 26, 2010.

By this adversary proceeding, the plaintiffs seek to have the debtors' discharge denied, pursuant to § 727(a)(4) of the United States Bankruptcy Code, as the result of materially false oaths. Throughout this proceeding, there have been discovery disputes, motions for sanctions, motions for judgment on the pleadings, and motions for summary judgment. The matter is presently before the court on the plaintiffs' motion for summary judgment and its motion for discovery sanctions. The motion for summary judgment is before the court following the expiration of the briefing period established by the court's local rules. See, N.D. Ind. L.B.R. B-7056-1; B-7007-1. The motion for discovery sanctions is before the court following a hearing held on that matter. This decision

addresses both.

Turning first to the motion for summary judgment, the entry of summary judgment is appropriate where there is “no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” See, Fed. R. Civ. P. Rule 56(c)(2); Fed. R. Bankr. P. Rule 7056. The moving party must initially identify “those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). Once it does so, the non-moving party must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact requiring trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct 1348, 1356 (1986). It may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983). Instead, the non-moving party is required to come forward and identify “specific facts” that are in issue and then, through the use of affidavits or other admissible evidence, affirmatively demonstrate the existence of genuine issues concerning them. In ruling on the motion, the court accepts the non-moving party’s evidence as true, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence and credibility of the witnesses. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511(1986).

In order to more quickly identify any meaningful factual disputes, the court’s local rules require the moving party to submit a “statement of material facts.” In this statement, the movant is to identify the critical facts upon which its motion is based and those facts are to be “supported by appropriate citations to discovery responses, depositions, affidavits, and other admissible evidence.”

N.D. Ind. L.B.R. B-7056-1. If the non-moving party disputes any of the those facts, it is required to file a “statement of genuine issues” in which it identifies the material facts that it claims are in dispute, supporting that contention “with appropriate citations to discovery responses, depositions, affidavits, and other admissible evidence, together with any affidavits or other documentary evidence controverting the movant’s position.” Id. The rule then goes on to emphasize the importance of observing these requirements:

In determining the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the “Statement of Genuine Issues” filed in opposition to the motion, as supported by the depositions, discovery responses, affidavits and other admissible evidence on file.  
Id.

The rule thus clarifies the moving parties’ need to first identify and come forward with the facts supporting its position and, once it has done so, the non-moving party’s obligation to identify which facts are in dispute and to come forward with evidence confirming the dispute. Waldrige v. American Hoechst Corp., 24 F.3d 918, 921-22 (7th Cir. 1994). See also, Vukadinovich v. Board of School Trustees, 278 F.3d 693, 699 (7th Cir. 2002) (“The non-movant will successfully oppose summary judgment only when it presents ‘definite, competent evidence to rebut the motion.’”).

The basis for the plaintiffs’ objection to the debtors’ discharge is that they have “knowingly and fraudulently, in or in connection with the case – made a false oath or account,” 11 U.S.C. § 727(a)(4)(A), primarily by filing false statements and schedules. Their statement of material facts, portions of which are quoted below, specifically identifies the debtors’ false statements and points to admissible evidence in the record demonstrating both that they were made and that they are false.

5. Specifically, the Original Petition and attached schedules omit and/or misrepresent the following:

- a. The Stuckeys reported that they did not own any businesses within the requisite reporting period (Original Petition at 54, ¶ 18), when in fact, they owned First Choice Appraisals, Inc., Maximum Mortgage, Inc., MMI, Inc., Maximum Insurance, Inc. and Stuckey Real Estate, Inc. (Third Notice of Amendment (Docket No. 08-13109; Document 75; November 9, 2009) (hereinafter “Third Amendment”), p. 7, ¶ 18);
- b. The Stuckeys failed to report income from the year 2006, other than a \$6,000 IRA (Original Petition at 49-50, ¶¶ 1-2), when in fact, they have now disclosed earning an additional \$44,792.00 jointly (Third Amendment, p. 2-3, ¶¶ 1-2);
- c. The Stuckeys misrepresented the income earned for the years 2006 through 2008, showing total earnings of \$115,624 over that time period (Original Petition at 49-50, ¶¶ 1-2), when in fact they have now disclosed earning at least \$198,301.91 over that time (Third Amendment, p. 2-3, ¶¶ 1-2);
- d. The Stuckeys misrepresented their average monthly take home pay to be only \$2,452.05 (Original Petition at 45), only to later disclose that their monthly average income somehow rose to \$4,919.05 (Second Notice of Amendment (08-13109; Document 72; June 17, 2009) (hereinafter “Second Amendment “), p. 2);
- e. The Stuckeys misrepresented their average monthly expenses to be \$3,790.00 (Original Petition at 46), only to later somehow inflate those average monthly expenses to \$4,935.00 (Second Amendment, p. 3); The Stuckeys submitted an inaccurate and misleading monthly net income of -\$1,337.95 (Original Petition at 45-46), only to later state that their monthly net income totaled -\$15.95 (Second Amendment, p. 3);
- e. The Stuckeys failed to identify any transfers of real property that occurred within the applicable reporting period (Original Petition at 52, ¶ 10), when in fact they transferred real property within the reporting period (Warranty Deed, Exhibit C); and,
- f. The Stuckeys failed to identify two legal actions to which one or both of them were named parties within the applicable reporting period (Original Petition at 50, ¶ 4), when one or both of them were parties to legal actions within that period (Exhibit D, Exhibit E).

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8. During the December 3, 2008 § 341 Meeting and the testimony therein, it became clear that the original Petition and attached schedules contained several misrepresentations and omissions, including the following:

- a. Mr. Stuckey admitted that he was the owner of Maximum Mortgage, yet that information was omitted from the Original Petition (Id. at 7);
- b. Mrs. Stuckey admitted that she was the owner of First Choice Appraisals, yet that information was omitted from the Original Petition (Id. at 8);
- c. Mr. Stuckey he was a party to civil litigation that was not listed on the Original Petition (Id.);
- d. Mr. Stuckey admitted that he was the owner of MMI Financial, yet that information was omitted from the Original Petition (Id. at 9);
- e. Mr. Stuckey testified that he did not own any other business that needed to be reported in the applicable reporting period (Id.), yet he owned Maximum Insurance, Inc. and Stuckey Real Estate, Inc. (Third Amendment, p. 7, ¶ 18);
- f. Mrs. Stuckey admitted that she earned income from First Appraisal in the year 2008, yet that information was omitted from the Original Petition (Exhibit A, p. 9); and,
- g. Mrs. Stuckey admitted that she earned approximately \$50,000 during the year 2006, yet that information was omitted from the Original Petition (Id. at 11).

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10. On January 7, 2008, the Debtors filed an Amended Statement of Financial Affairs. See First Notice of Amendment (Docket No. 08-13109; Document 44; January 7, 2009) (hereinafter “First Amendment”).

11. The Debtors' amended schedules and Statement of Financial Affairs omit several items of information required to be disclosed in and material to this case. Id. at pp. 2-3, 5, 7-8, Exhibits C, D & E.

12. Specifically, the First Amendment omits and/or misrepresents the following:

- a. The Stuckeys reported ownership only in First Choice Appraisals,

Inc., Maximum Mortgage, Inc., MMI, Inc., Maximum Insurance, Inc. (First Amendment, p. 7, ¶ 18), when in fact the also owned Stuckey Real Estate, Inc. (Third Amendment, p. 7, ¶ 18);

- b. The Stuckeys failed to report income from the year 2006, other than a \$6,000 IRA (First Amendment, pp. 2-3, ¶¶ 1-2), when in fact, they have now disclosed earning an additional \$44,792.00 jointly (Third Amendment, pp. 2-3, ¶¶ 1-2);
  - c. The Stuckeys misrepresented the income earned for the years 2006 through 2008, showing total earnings of \$153,509.91 over that time period (First Amendment, pp. 2-3, ¶¶ 1-2), when in fact they have now disclosed earning at least \$198,301.91 over that time (Third Amendment, p. 2-3, ¶¶ 1-2);
  - d. The Stuckeys failed to identify any transfers of real property that occurred within the applicable reporting period (First Amendment, p. 5, ¶ 10), when in fact they transferred real property within the reporting period (Warranty Deed, Exhibit C); and,
  - e. The Stuckeys failed to identify two legal actions to which one or both of them were named parties within the applicable reporting period (First Amendment, p. 3, ¶ 4), when one or both of them were parties to legal actions within that period (Exhibit D, Exhibit E).
13. On February 4, 2009, the §341 Meeting of Creditors resumed.
14. During that meeting, the Debtors reaffirmed the alleged accuracy of their amended schedules, the amended statement of financial affairs and the information contained therein, as well as the remainder of the original filings which they did not amend.
15. During that Meeting, the Debtors were questioned on several specific disclosures made in their schedules and Statement of Financial Affairs, and, once again, the Debtors reaffirmed the accuracy of those disclosures and the information contained therein.
16. During that Meeting, undersigned counsel confronted the Debtors with evidence clearly demonstrating the inaccuracy of the disclosures made in Debtors' filings and their statements under oath. And, only when confronted with that evidence did the Debtors admit that they had not fully disclosed all of the information required to have been disclosed from the very beginning of this bankruptcy proceeding.

17. On June 17, 2009, the Stuckeys once again amended their disclosures and filed a Second Amended Statement of Financial Affairs and Amended Schedules I and J. See Second Notice of Amendment (Docket No. 08-13109; Document 72; June 17, 2009) (hereinafter “Second Amendment”).

18. Despite the fact that this was the third time the Stuckeys had filed this information, the Second Amendment still omitted several material items of information required in this case. *Id.* at pp. 2-3, 5-6, 8, Exhibits C, D & E.

19. Specifically, the Second Amendment omits and/or misrepresents the following:

- a. The Stuckeys failed to report income from the year 2006, other than a \$6,000 IRA (Second Amendment, pp. 5-6, ¶¶ 1-2), when in fact, they have now disclosed earning an additional \$44,792.00 jointly (Third Amendment, pp. 2-3, ¶¶ 1-2);
- b. The Stuckeys misrepresented the income earned for the years 2006 through 2008, showing total earnings of \$153,509.91 over that time period (Second Amendment, pp. 5-6, ¶¶ 1-2), when in fact they have now disclosed earning at least \$198,301.91 over that time (Third Amendment, p. 2-3, ¶¶ 1-2);
- c. The Stuckeys disclosed that their monthly average income was \$4,919.05 (Second Amendment, p. 2), meaning that they previously misrepresented their average monthly take home pay to be only \$2,452.05 (Original Petition at 45);
- d. The Stuckeys inflated their average monthly expenses to \$4,935.00 (Second Amendment, p. 3), which contradicts their previous representation of average monthly expenses of \$3,790.00 (Original Petition at 46);
- e. The Stuckeys indicated that their monthly net income totaled -\$15.95 (Second Amendment, p. 3), which directly contradicts their previous representation of monthly net income of -\$1,337.95 (Original Petition at 45-46);
- f. The Stuckeys failed to identify any transfers of real property that occurred within the applicable reporting period (Second Amendment, p. 8, ¶ 10), when in fact they transferred real property within the reporting period (Warranty Deed, Exhibit C); and,
- g. The Stuckeys failed to identify two legal actions to which one or both

of them were named parties within the applicable reporting period (Second Amendment, p. 6, ¶ 4), when one or both of them were parties to legal actions within that period (Exhibit D, Exhibit E).

20. On November 9, 2009, the Stuckeys once again amended their disclosures and filed a Third Amended Statement of Financial Affairs. See Third Notice of Amendment.

21. Despite the fact that this was the fourth time the Stuckeys had filed this information, the Third Amendment still omitted several material items of information required in this case. Id. at pp. 3, Exhibits D & E.

22. Specifically, the Third Amendment omits and/or misrepresents the following:

- a. The Stuckeys failed to identify two legal actions to which one or both of them were named parties within the applicable reporting period (Third Amendment, p. 3, ¶ 4), when one or both of them were parties to legal actions within that period (Exhibit D, Exhibit E). Plaintiffs' James and Jane Craver, Brief in Support of Motion for Summary Judgment. (footnote omitted).

Defendants' response to the motion<sup>1</sup> fails to successfully controvert any of these facts. None of them are specifically disputed and, to the extent the defendants might have attempted to controvert some of them, they have not identified any facts in the record or come forward with affidavits or other evidence that creates a genuine issue concerning them.

To deny a discharge under §727(a)(4)(A) requires that the debtor "(1) . . . made a false oath

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<sup>1</sup>Once a motion for summary judgment is filed, the opposing party has thirty days within which to file a response, after which the moving party's time to reply begins to run. See, Fed. R. Civ. P. Rule 56(c); N.D. Ind. L.B.R. B-7056-1, B-7007-1(a). Thirteen days after the plaintiffs filed their motion, the defendants filed a two-page response which essentially stated that the defendants have done everything they needed to, the plaintiffs are harassing them, and the motion should be denied. Over two weeks later, the defendants filed a more substantive response. Yet, there is no provision in the rules of procedure which allows for such a supplemental response, absent leave of court which was never requested. As a result, the plaintiffs argue that the supplemental response should not be considered by the court. The argument does not matter because, even when the court considers the supplemental response (and it has done so in connection with this decision), the defendants have still failed to establish any genuine issue of material fact.

or account in connection with his or her bankruptcy proceeding; and (2) that such false oath or account was knowingly and fraudulently made.” In re Martin, 88 B.R. 319, 323 (D. Colo. 1988) (citing In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984)). Material omissions from the debtors’ schedules and statement of financial affairs may constitute a false oath for the purposes of this section, United States v. Ellis, 50 F.3d 419, 423-24 (7th Cir. 1995), as can false testimony given by the debtor during examination by the trustee, such as the meeting of creditors, or the court. Matter of Beaubouef, 966 F.2d 174, 178 (5th Cir. 1992). A matter is material “if it bears a relationship to the debtor’s business transactions or estate, or concerns discovery of assets, business dealings or existence or disposition of [debtor’s] property.” In re Montgomery, 86 B.R. 948, 956 (Bankr. N.D. Ind. 1988). There is no requirement that creditors be prejudiced by the false statements. Montgomery, 86 B.R. at 957; In re Calder, 93 B.R. 734, 738 (Bankr. D. Utah 1988) (aff’d. 907 F.2d 953 (10th Cir. 1990)). “[R]ather, the question of materiality depends on whether the false oath was pertinent to the discovery of assets or past transactions.” Montgomery, 86 B.R. at 957.

The debtors clearly made numerous false oaths in their bankruptcy schedules and statements. They omitted and misrepresented income received during the years prior to the petition, failed to include interests in businesses they owned, misrepresented income and expenses, and failed to list transfers of property and legal actions to which they were parties.<sup>2</sup> Given the low threshold for

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<sup>2</sup>As for the litigation that was not disclosed, debtors’ counsel argues that it did not need to be disclosed because it was filed more than one year prior to the bankruptcy. Yet the question does not ask about litigation filed during the year prior to the petition but about “all suits and administrative proceedings to which the debtor was a party within one year immediately preceding the . . . bankruptcy.” Statement of Affairs, question 4. While those actions were not filed during the year prior to the petition, they were pending during that time. The last activity in U.S. v. Stuckey, N.D. Ind. Case No. 1:07cr54, was on August 6, 2009, and while ABN Amro v. Maximum Mortgage, Inc., N.D. Ind. Case No. 1:04cv492, to which Mr. Stuckey was a party, had been stayed due to the criminal case against him, it was not, and has never been, dismissed. They both should have been

something to be material, see e.g., In re Sears, 246 B.R. 341, 347 (8th Cir. BAP 2000) (citing In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984), the omissions and inaccuracies here are material. Information concerning income, expenses, businesses in which the debtors had an interest, property they transferred and litigation they were involved in clearly bear a relationship to their business dealings, the discovery of assets, or the existence and disposition of their property. In re Chalik, 748 F.2d 616, 618 (11th Cir.1984).

Since debtors made materially false oaths, the question becomes whether they did so “knowingly and fraudulently.” 11 U.S.C. § 727(a)(4). This requirement of § 727(a)(4) “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). See also, Martin, 88 B.R. at 323; In re Bujak, 86 B.R. 30, 31 (Bankr. W.D. N.Y. 1988); Matter of Kilson, 83 B.R. 198, 203 (Bankr. D. Conn. 1988); In re Krich, 97 B.R. 919, 923 (Bankr. N.D. Ill. 1988); In re Zahneis, 75 B.R. 201, 203 (Bankr. S.D. Ohio 1987). While the intent necessary to deny or revoke a discharge must be actual fraud, In re Montgomery, 86 B.R. 948, 957 (Bankr. N.D. Ind. 1988), actual knowledge that a statement is false and a conscious intent to deceive are not always required. The requisite fraudulent intent also exists where 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. In re Martin, 88 B.R. 319, 324 (D. D. Colo. 1988) (quoting In re Diodati, 9 B.R. 804, 808 (Bankr. D. Mass. 1981)). Thus, a debtor’s reckless disregard for the truth of the information contained in its bankruptcy statements and schedules is sufficient to bar a discharge and may be regarded as the equivalent of actual fraud on the part of a debtor who submits false or inaccurate  

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disclosed.

information. Montgomery, 86 B.R. at 957. See also, In re Yonikus, 974 F.2d 901, 905 (7th Cir. 1992); In re Tully, 818 F.2d 106, 112 (1st Cir. 1987). Reckless disregard means “not caring whether some representation is true or false . . . .” In re Chavin, 150 F.3d 726, 728 (7th Cir. 1998). See also, In re Diodati, 9 B.R. 804, 809 (Bankr. D. Mass. 1981)(quoting Le Lievre v. Gould, 1 Q.B. 491, 498 (1893). If the bankruptcy schedules reflect such an indifference to the truth then no further evidence of fraud is necessary. In re Costello, 299 B.R. 882, 900 (Bankr. N.D. Ill. 2003); In re Calisoff, 92 B.R. 346, 355 (Bankr. N.D. Ill. 1988).

The number and the nature of the misstatements and omissions complained of, and their repetition through several amendments, are such that the only legitimate inference to be drawn from them is of a fraudulent intent. See, Matter of Yonikus, 974 F.2d 901, 905-06 (7th Cir. 1992) (“finding of fraudulent intent may be based on inferences drawn from a course of conduct”); In re Reed, 293 B.R. 65, 70 (Bankr. D. Kan. 2003) (denying discharge under § 727(a)(4)(A) on summary judgment). To give rise to any other possible inference, the debtors had to come forward with facts explaining how the omissions and misstatements occurred. See, In re Braun, 98 B.R. 382, 386 (Bankr. N.D. Ill. 1989); In re Mathern, 137 B.R. 311, 322-23 (Bankr. D. Minn. 1992) (both inferring fraudulent intent on summary judgment).

[T]he Bank produced evidence supporting an inference of [fraudulent] intent. Once the Bank produced such evidence, it became incumbent on the Debtors to rebut such evidence with facts indicating that intent was in dispute. . . . [T]he Debtors did not show that there was any other inference to be drawn from the facts in evidence. In the absence of any other evidence, the bankruptcy court could only conclude that the element of intent under § 727(a)(4)(A), as presented by the Bank, was uncontroverted. First National Bank v. Davison, 2004 WL 2852352 \*4 (10th Cir. BAP 2004) (affirming summary judgment denying discharge).

As the Seventh Circuit has succinctly stated: “Where all the circumstantial evidence points to

fraudulent intent, at least some of it has to be explained away.” U.S. v. Denlinger, 982 F.2d 233, 237 (7th Cir. 1992) (affirming the district court’s finding of fraud on summary judgment). Debtors did not do so. Instead of offering an explanation for the falsehoods, they argue that the plaintiffs are acting like a “super trustee” and have no right to object to their discharge and the amendments to their schedules and statement of financial affairs cured everything. Neither argument has any foundation.

As for the debtors’ first argument – that the plaintiffs are usurping the role of the trustee and had there been a basis for objecting to their discharge the trustee would have done so – it ignores the reality that § 727(c)(1) specifically permits “a creditor . . . [to] object to the granting of a discharge.” 11 U.S.C. § 727(c)(1) (emphasis added). Creditors routinely object to a debtor’s discharge, see, 6 Collier on Bankruptcy ¶ 727.14 (15th ed. rev.), and there is nothing unusual or abnormal about them doing so here. In the face of the plain language of the statute, see, U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 1030 (1989) (where the language of a statute is plain, “the sole function of the courts is to enforce it according to its terms”), the debtors’ argument has no merit.

As for the second argument – that their amended schedules and statement of financial affairs cured any false oath that was made and absolve them from any consequences – that simply is not so. Mazer v. U.S., 298 F.2d 579, 582 (7th Cir. 1962) (quoting Kern v. United States, 169 F. 617 (6th Cir. 1909) (“the offenses of false swearing and concealment when once committed could not be retrieved by right and lawful conduct and the doing of things ‘meet for repentance’”). See also, Payne v. Wood, 775 F.2d 202, 205 (7th Cir. 1985) (“If debtors could omit assets at will, with the only penalty that they had to file an amended claim once caught, cheating would be altogether too attractive.”); In re Mellor, 226 B.R. 451, 459-60 (D. Col. 1998) (“An inference of fraud is permissible . . . when

the evidence indicates that the amendment is not in fact voluntary [and] offered only . . . after the debtor ‘knew that the cat was out of the bag,’ well after the meeting of creditors, or without adequate explanation of the reason for their initial inaccuracy.”); Bensenville Community Ctr. Union v. Bailey, 147 B.R. 157, 165 (Bankr. N.D. Ill. 1992) (“Subsequent voluntary disclosure through testimony or an amendment to the schedules cannot expunge the falsity of an oath.”); Suggitt v. French, 2003 WL 21288644 \*2 (Bankr. D. Vt. 2003) (“[W]hen a debtor files schedules that are not clear . . . and are amended multiple times, a reasonable person would have cause to question whether the original schedules were merely prepared sloppily or were calculated to obfuscate the truth.”). Neither can amending schedules create a genuine issue of material fact. In re Sholdra, 249 F.3d 380, 382-83 (5th Cir. 2001).

Debtors are required to accurately disclose their assets. That duty is absolute. Yonikus, 974 F.2d at 904. While an amendment may help to minimize the consequences of any falsehood, it does not change the fact that false oaths were made and, without a satisfactory explanation of innocence, those false oaths may suffice to deny a discharge even after statements and schedules have been amended.

The many omissions and inaccuracies in the schedules and statement of financial affairs were corrected only after the debtors were caught. This explains the piecemeal way the schedules were amended and debtors’ repeated need to do so. As inaccuracies were revealed, the debtors would amend their schedules to reflect the new information and as more inaccuracies were disclosed, they would do so again. In the face of this repeated pattern of failing to accurately disclose information, to avoid summary judgment the debtors had to come forward with evidence that supported an innocent explanation for what otherwise appears to be, at the very least, a reckless disregard for the

accuracy of the information they provided.

There is no genuine issue of material fact and the plaintiffs are entitled to the entry of judgment, denying the debtors' discharge, as a matter of law.

Despite the disposition of the motion for summary judgment, the court must still consider the plaintiffs' motion for discovery sanctions. Although it too seeks a denial of discharge (by default as a sanction for the failure to comply with discovery orders) it also seeks an award of their attorney fees and expenses, relief that is not otherwise available to the plaintiffs through § 727. As a result, the court's decision to deny the debtors' discharge does not moot the motion for sanctions.

By its order of November 25, 2009, the court granted the plaintiffs' earlier motion to compel discovery<sup>3</sup> and ordered that the defendants to provide "full, complete, and non-evasive answers" to the plaintiffs' interrogatories and to produce the requested documents within fourteen days. The order went on to require the defendants to appear for depositions on December 21, 2009 – a date the parties had agreed upon in open court. After only one of the defendants, Teresa Stuckey, appeared for the deposition, and the plaintiffs did not receive "full, complete, and non-evasive answers" or all of the documents sought, they filed a motion for sanctions, pursuant to Rule 37(b)(2), asking the court to issue a default judgment in their favor and for an award of attorney fees. Fed. R. Bankr. P. Rule 37(b)(2); Fed. R. Bankr. P. Rule 7037.

The entry of sanctions under Rule 37 and the type of sanction are matters committed to the court's discretion. See, Golant v. Levy, 239 F.3d 931, 937 (7th Cir. 2001); Melendez v. Illinois Bell Telephone Co., 79 F.3d 661, 670 (7th Cir. 1996). The type of sanctions may include dismissal or

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<sup>3</sup>Responses to the plaintiffs' discovery requests were initially due at the end of July. The plaintiffs sent reminders and gave extensions to the defendants, to no avail. The defendants further failed to appear for a deposition in August.

the entry of judgment by default against the party who fails to comply with discovery orders. See, Golant, 239 F.3d at 937. So long as the conduct complained of displayed willfulness, bad faith, or fault, dismissal or a default judgment is a proper sanction. In re Thomas Consol. Indus., Inc., 456 F.3d 719, 724 (7th Cir. 2006); Poulos v. Naas Foods, Inc., 959 F.2d 69, 75 (7th Cir. 1992).

At the hearing on the most recent sanctions motion, the defendants acknowledged that Mr. Stuckey did not attend the deposition and did not sign the responses to the interrogatories.<sup>4</sup> Although Mrs. Stuckey did appear, her deposition was not as fruitful as the plaintiffs had anticipated because she did not bring many of the documents they expected. Not only were the defendants' discovery responses submitted after the deadline established by the order of November 25, but when asked to produce documents such as tax returns, the defendants' response indicated that copies of some tax returns were attached and the plaintiffs could request the remainder themselves from the appropriate taxing authority. A similar response was given when it came to bank statements. Other responses contained objections to the requests being posed.

As to the sufficiency of their interrogatory responses and the inadequacies in the documents produced, the defendants argued that the plaintiffs' requests were not reasonable and advanced other assorted challenges to the relevance of the information and materials sought.<sup>5</sup> Yet, those arguments were waived long ago when the defendants failed to timely respond to the plaintiffs' original

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<sup>4</sup>At the hearing on the sanctions motion, counsel stated that Mr. Stuckey is currently in a correctional facility, and apparently has been for some time. Why that fact was not brought to the court's attention at the hearing on the plaintiffs' earlier motion to compel and why, at that hearing, the defendants agreed that Mr. Stuckey would attend a deposition on December 21 are not explained.

<sup>5</sup>The defendants also argued that this proceeding was simply a means of harassment and that they believed the complaint lacked any merit. Those arguments are wholly outside the scope of the issues raised by a motion for discovery sanctions.

discovery – something the court pointed out to the defendants at the November hearing on the plaintiffs’ earlier motion to compel. Fed. R. Civ. P. Rules 33(b)(4); 34(b)(2)(C). See also, Whitlow v. Martin, 259 F.R.D. 349, 354 (C.D. Ill. 2009); Autotech Technologies Ltd. Partnership v. Automationdirect.com, 236 F.R.D. 396, 398 (N.D. Ill. 2006).

Although they had been given multiple extensions of time by the plaintiffs, the defendants failed to comply with their obligations to respond to discovery and then failed to obey a court order requiring them to do so. The failure to produce material or provide answers as directed by the court is sufficient to constitute bad faith. Golant, 239 F.3d at 937. See also, In re McFarland, 261 B.R. 922, 924 (Bankr. N.D. Ind. 2001).

By the court’s order of November 25, 2009, the debtors were directed to “provide full, complete, and non-evasive answers to Plaintiffs’ interrogatories and produce the documents required within fourteen (14) days.” They did not do so. Furthermore, Mr. Stuckey failed to attend his deposition, despite counsel’s representations to the court and to the plaintiffs that he would be in attendance on the date counsel agreed to in open court. The defendants then attempted to justify their actions, at least in part, by objecting to the plaintiffs’ discovery and advancing arguments they had already been told were forfeited. Given the defendants’ historical failure to respond to discovery requests, which led the court to grant plaintiffs’ earlier motion to compel, the defendants’ failure to comply with that order was willful and in bad faith. Sanctions are appropriate and the appropriate sanction is the entry of judgment by default. Furthermore, pursuant to Rule 37(a)(5),

the court must . . . require the party or deponent whose conduct necessitated the motion, or the attorney advising the conduct, or both to pay the movant’s reasonable expenses in making the motion, including attorney’s fees. Fed. R. Civ Pro. Rule 37(a)(5).

The only exceptions are if the motion was filed before a good faith attempt to resolve the matter without court intervention, opposition to discovery was substantially justified, or other circumstances make an award unjust. Id. at (a)(5)(i-iii). None of those exceptions apply or are even argued for here.

IT IS THEREFORE ORDERED THAT:

1. Debtors' discharge will be denied and a judgment doing so will be entered.
2. Plaintiffs are entitled to recover their reasonable costs, expenses and attorney fees associated with the motion for discovery sanctions filed on January 27, 2010. Plaintiffs shall have fourteen (14) days from this date within which to file and serve affidavits itemizing any such fees and expenses, following which, the defendants shall have fourteen (14) days thereafter to file any objections thereto. In the absence of objection, the court will determine the reasonable amount of any fees and expenses without further notice or hearing.

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