

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
MICHAEL J. D'ANGELO) CASE NO. 09-21201-jpk
) Chapter 7
Debtor.)
*****)
KENNETH A. MANNING)
)
Plaintiff,)
)
v.) ADVERSARY NO. 09-2225
)
MICHAEL J. D'ANGELO)
)
Defendant.)

JUDGMENT OF DEFAULT DENYING DISCHARGE

This adversary proceeding was commenced by complaint filed by Kenneth A. Manning, the Chapter 7 Trustee of the bankruptcy estate of Michael J. D'Angelo in Case No. 09-21201, on December 28, 2009. The record establishes that service of process of summons and complaint was properly made upon the defendant, and that the defendant failed to appear or respond to the complaint. Entry of Default was made on December 22, 2011. On June 21, 2011, the plaintiff filed a motion of default judgment denying debtor's discharge. Accompanying that motion is the Affidavit of Kenneth A. Manning purportedly establishing the grounds for denial of discharge asserted in the complaint.

The plaintiff has asserted grounds for denial of discharge under 11 U.S.C. § 727(a)(2)(A), §727(a)(2)(B), §727(a)(4)(A), §727(a)(3), §727(a)(4)(D), and 11 U.S.C. § 729(a)(6)(A). With respect to the latter Section – referenced in subparagraph (F) in the prayer for relief in the complaint – there is no Section 729(a)(6)(A). It may seem apparent that the plaintiff sought to assert a ground under 11 U.S.C. § 727(a)(6)(A), but that is not what the complaint actually states. In the context of this portion of the prayer for relief, Fed.R.Bankr.P.

7054(a)/Fed.R.Civ.P. 54(c) states that: "A default judgment must not differ in kind from, or exceed an amount, what is demanded in the pleadings." Thus, the complaint fails to state a claim under 11 U.S.C. § 727(a)(6)(A).

The complaint is essentially premised upon the debtor's/defendant's statement of false information and failure to disclose information concerning monies received prior to the filing of his case in the operation of his sole proprietorship. In support of the motion for default judgment, the Affidavit of the plaintiff asserts essentially that the plaintiff was told by third parties that certain information stated by the defendant under oath was not true. No affidavits from the parties making these assertions were submitted into the record, and thus the statements of whatever these parties may have told the plaintiff affiant are hearsay and are not admissible into evidence (See, Fed.R.Ev. 602). It is a basic principle that affidavits submitted in support of any action in a federal court must be based upon personal knowledge, or must contain information that is otherwise admissible into evidence. The statements of whatever it might have been that the plaintiff affiant was told do not fall within the parameters of this requirement. On the record before this court at this time, there is no basis to sustain a motion for default judgment pursuant to 11 U.S.C. § 727(a)(2)(A), §727(a)(2)(B), §727(a)(4)(A). There may be a basis to establish grounds for the concealment or withholding of recorded information necessary to establish the basis for § 727(a)(3) or § 727(a)(4D), but in this context the concepts of "concealment" or "withholding" would appear to connote the necessary element of establishing that the information actually existed. Because there is no direct admissible evidence of any falsity in the debtor's testimony – as stated the record seeks to establish falsity by means of hearsay – there is no basis for a judgment under 11 U.S.C. § 727(a)(4)(A). As stated, had the complaint asserted the proper provision of 11 U.S.C. § 727(a)(6)(A), a judgment could have been sustained on the basis of that statute – unfortunately, the complaint did not do so.

IT IS ORDERED that a hearing will be held on **November 18, 2011 at 11:00 A.M.**
pursuant to Fed.R.Bankr.P. 7055/Fed.R.Civ.P. 55(b)(2) to determine the course of further
proceedings with respect to the foregoing motion.

Dated at Hammond, Indiana on October 28, 2011.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Attorneys of Record
Defendant