

NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 11-14547)	
)	
DARREN LEE SIMMONS)	
)	
Debtor)	
)	
)	
CROSSROADS BANK)	
)	
Plaintiff)	
)	
vs.)	PROC. NO. 12-1111
)	
DARREN LEE SIMMONS)	
)	
Defendant)	

DECISION ON OBJECTION TO DISCHARGE

At Fort Wayne, Indiana, on June 24, 2014.

By this adversary proceeding, the plaintiff seeks to have the debtor’s discharge denied, pursuant to § 727(a)(4) of the United States Bankruptcy Code, as the result of materially false oaths. That question is before the court following trial in this adversary proceeding and the filing of post-trial briefs.

Section 727(a)(4) authorizes the court to deny a debtor’s discharge where

(4) the debtor knowingly and fraudulently, in or in connection with the case –

(A) made a false oath or account[.] 11 U.S.C. § 727(a)(4)(A).

Both requirements must be fulfilled. The debtor must have made a false oath or account and such false oath or account must have been knowingly and fraudulently made. In re Martin, 88 B.R. 319, 323 (D. D. Colo. 1988) (citing In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984)). Material omissions from the debtor’s schedules 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 “knowingly and fraudulently” 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). 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 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).

The debtor is required to accurately disclose all its assets. This duty is absolute. Matter of Yonikus, 974 F.2d 901, 904 (7th Cir. 1992). See also, In re Riley, 128 B.R. 567, 570 (Bankr. N.D. Okl. 1991)(“A debtor has an uncompromising duty to disclose whatever ownership interest he holds in property.”); In re Lunday, 100 B.R. 502, 508 (Bankr. D. N.D. 1989). If there is doubt about whether or not to list certain items, the debtor should disclose them. See, Richardson v. Von Behren, 314 B.R. 169, 180 (Bankr. C.D. Ill. 2004).

The debtor retained counsel¹ to file his personal bankruptcy² in December 2011. Although counsel was in the process of closing his office within the next couple of weeks, he agreed to represent the debtor. Given the length of time between the initial filing of the case and this proceeding, no one has a clear memory of what initially transpired. They do agree that during their meeting on December 8, 2011, counsel asked questions of the debtor and wrote the debtor’s responses on photocopies of the petition, schedules and statement of affairs. What happened next is more of a mystery. Counsel believes he would have sent the handwritten documents home with the debtor to complete them and, after their return, would have typed the documents for the debtor’s review and signature. The debtor claims he took nothing with him, that he only went to counsel’s

¹In this adversary proceeding, the debtor is not represented by the same attorney who filed his underlying bankruptcy or the successor counsel who represented the debtor until March 2013. Neither is he represented by the counsel who represents The Simmons Company LLC.

²The debtor, as manager, of The Simmons Company LLC signed a petition for relief it filed on December 9, 2011, in the Southern District of Indiana.

office once, and, while there, was directed to sign the petition, schedules and statement of affairs prior to their actual preparation:³ in other words, he says he was asked to sign blank pages.⁴ About one week later, on December 15, 2011, the petition, schedules and statement of affairs were filed. Because the required signature pages were not filed with the schedules and statement of affairs, see, Fifth Amended Order Authorizing Electronic Case Filing, ¶11(c), they were stricken by a docket entry dated January 4, 2012, due to the failure to comply with the court's order of December 16. Since counsel's office was now closed, he instructed the debtor to go to the firm's Elwood office to prepare new schedules. The debtor did so and signed the new documents on January 6, 2012, which were filed on February 6, 2012.⁵ It is this set of schedules and this statement of financial affairs – the documents filed on February 6 – that form the basis for the allegations of false oaths.⁶

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 had read and understood the documents filed and

³Although the meeting was held on December 8, the signature page for the petition filed on December 15 is dated December 9, 2011.

⁴Signing things in blank does not allow a debtor to avoid responsibility for the accuracy of what might end up being submitted. To the contrary, signing the bankruptcy schedules, statements, etc. in blank is the epitome of a reckless indifference to the truth. See, In re Retz, 606 F. 3d 1189, 1199 (9th Cir. 2010); In re Leija, 220 B.R. 497, 503 (Bankr. E.D. Cal. 2001).

⁵Counsel believed the case had been dismissed and that a new case needed to be filed. That was not so. There was no dismissal. Nonetheless, based on that belief, a second case was filed in January, which the court subsequently dismissed in accordance with Matter of Sidebottom, 430 F.3d 893 (7th Cir. 2005). The schedules prepared for the January case appear to be those used as amended schedules in this case.

⁶As for the schedules and statement of affairs filed on December 15, since the court has never been presented with a signed declaration that would accompany them, there is no proof that they were signed under penalties of perjury so as to constitute a false oath. As a result, they have been disregarded in determining whether plaintiff has proven its case.

whether they were true, accurate and complete; he replied that he had and that they were. Plaintiff's Exhibit 5, Transcript of § 341 Meeting held March 6, 2012, pgs. 3-4. That testimony was not true. He had not and they were not.

During the pendency of this case, the number of alleged false oaths has increased and decreased through two amended complaints, a joint pre-trial order and trial, rising at one time to a high of 51. Following trial, only 16 remained:

1. Failure to list an interest in real property located at 2863 S 150 E;
2. Failure to list the transfer of real property located at 1910 E. Kaiser;
3. Failure to include 2011 income on the statement of financial affairs;
4. Failure to list an interest in The Simmons Company LLC, B & D Family Partnership, B & D Family Investments, and Northeast Indiana Complete Construction Service;
5. Failure to list a debt owed to the debtor by The Simmons Company;
6. Failure to list \$40,000 owed by the debtor to his mother;
7. Failure to list his domestic support obligations;
8. Failure to list the transfer of a gun collection and gun safe;
9. Failure to list a Harley-Davidson Screaming Eagle motorcycle;
10. Failure to list a lawn tractor;
11. Failure to list the transfer of an interest in a campground lot;
12. Failure to either list an interest in a 2006 camper or to disclose that it belonged to someone else but was in his possession;
13. Failure to list the transfer of a 2004 Ford F-350, which was sold approximately five weeks prior to the petition;
14. Failure to disclose that a 1999 camper had been sold approximately one month

prior to the petition;

15. Failure to provide accurate information regarding 2009 income and tax returns;
and

16. False testimony at the § 341 meeting that the debtor had read, understood, and signed the documents filed on his behalf, that they were true, complete and accurate, that he had listed everything he owned and everyone to whom he owed money, and that he had not transferred any property to anyone during the year prior to the petition.

The debtor's testimony at the § 341 meeting was undeniably false. At trial, he tried to minimize that falsity by explaining he thought the trustee was asking about information contained in his tax returns, not the information contained in his schedules and statement of financial affairs. That is something the court just does not believe; it is nothing more than a clumsy fabrication. Furthermore, it was not until midway through the meeting that the trustee asked the debtor about his tax returns, to which he responded that he had yet to file them for 2010 and 2011 and would be requesting an extension of time to do so. If they had not yet been prepared and filed, how could the debtor say that he had signed them and the information they contained was true and accurate? See, Plaintiff's Exhibit 5.

As to the \$40,000 owed to the debtor's mother, she testified that she considered this to have been a gift to help her son with his finances following his divorce and never expected repayment. The court has no reason not to believe that testimony. Since the money was a gift and not a loan, the failure to list it as a debt was not false.

As for the failure to list the property at 2863 S 150 E, the debtor may have dodged a bullet. Although the debtor was a title holder of record, he claims he believed the property was owned by The Simmons Company and so did not disclose it. In the litigation that ensued between the two

bankruptcy estates, a settlement was reached vesting title in the company. It is only by virtue of that outcome that the court reluctantly concludes that the debtor's failure to disclose his interest of record was not materially false.

As for the debtor's 2011 income, when asked about his gross income for the calendar year in which the case was filed the debtor stated: "Year to date: \$0.00." Plaintiff's Exhibit 4, Statement of Financial Affairs, filed Feb. 6, 2012, Question 1. That statement was false. Although the debtor's 2011 tax returns had not been prepared when he signed the statement of affairs in January 2012, the debtor had income in 2011.⁷ When the return was eventually filed it listed \$5,000 in wages and \$132,936 in rental income. Although his total income (line 22) for that year was negative, due to an NOL carryover, to affirmatively state that gross income was zero on the statement of affairs misrepresents the debtor's situation and misleads the reader into thinking that nothing was coming in when the reality was that substantial sums passed through the debtor's hands.

As for the failure to list domestic support obligations, the court does not find that to have been a false oath, at least not materially so. Debtor's obligation to his former spouse is disclosed; it simply is listed in the wrong place, having been put on schedule F (unsecured claims) rather than schedule E (priority claims). The court is not inclined to fault the debtor for failing to appreciate the distinction.

As for the remaining false oaths, there is no real dispute that the failure to list those items or disclose their transfer constitutes a false oath or that the omitted/incorrect information was material. Instead, the question is whether the debtor acted with the requisite intent. In other words, whether

⁷The same question also asks about gross income for the two years immediately preceding this calendar year, to which the debtor answered "\$0.00" both times, adding that "2009 and 2010 tax returns are not available at this time".

all the false oaths were knowingly and fraudulently made. The debtor argues they were not. He seems to contend that the one month delay between the signing and the filing of the amended schedules and statement of affairs somehow means they were not signed under oath. He also claims that some of the omissions were based on the advice of counsel, that counsel had all of the information needed to fully and accurately complete the documents, including 2009 tax returns and a copy of the divorce decree; so anything not listed is attributable to counsel's decision and the debtor cannot be held responsible for decisions his attorney made. Finally, he explains that his understanding of the term "transfer" led him not disclose what were indeed transfers. Once all of this is factored in, there is only one item – a lawn tractor – which was not scheduled and this one item is not enough, according to the debtor, to deny his discharge.

The amended schedules and statement of affairs were signed under oath and filed in the case. According to the debtor's testimony, he was simply given the documents and told to sign them; he was not instructed to review them and he neither asked what they were nor reviewed them prior to signing. Instead, he chose to blindly sign what was put in front of him. Then, at the § 341 meeting, when asked about their execution, he testified that he had read, understood, and signed them, and that they were true and accurate. The one month delay between their signing and the filing does not somehow undo that they were signed under oath. There is no requirement that the signing be contemporaneous with the filing and there is often a delay between when documents are signed and when they are filed. Debtor's statements are either true or false when made, and the debtor either acts with or lacks the requisite intent at that time. The truth or falsity of debtor's statements or their fraudulent nature does not change based on the date the document is filed. The court finds that the amended schedules were signed under oath and filed in the case.

Where a discharge is challenged based upon a false oath, the argument is sometimes made that the debtor acted upon advice received from their bankruptcy attorney; thus the falsehood was not fraudulent. See e.g., In re Dawley, 312 B.R. 765, 787 (Bankr. E.D. Penn. 2004); In re Montgomery, 86 B.R. 948, 959-60 (Bankr. N.D. Ind. 1988). See also, In re Martin, 124 B.R. 542, 546-47 (Bankr. N.D. Ind. 1991). The debtor appears to argue that once he gave counsel various documents and answered questions, he could apparently wash his hands of the matter, leaving all of the responsibility for the accuracy of the schedules to counsel; without any obligation on his part to review what counsel produced or question anything that might seem amiss. That is not so. In re Magnuson, 113 B.R. 555, 559 (Bankr. D.N.D. 1989) (“Before affixing their signatures to schedules Debtors are under an affirmative duty to read the schedules and satisfy themselves that they are ‘true and correct to the best of their knowledge, information and belief.’”). Answers given under those circumstances are classic examples of “not caring whether some representation is true or false” Chavin, 150 F.3d at 728. When presented with a stack of papers, including amended schedules and amended statement of financial affairs in January 2012, the debtor testified that he had not seen the amended schedules or statement of financial affairs, was just told to sign and he did. He did not ask what he was signing, made no effort to study what he was affirming under oath, verify the accuracy of the documents, or question what they were or the information they contained. This demonstrates a reckless disregard for their accuracy. See, In re Olbur, 314 B.R. 732, 746 (Bankr. N.D. Ill. 2004); In re Bren, 303 B.R. 610, 614 (8th Cir. BAP 2004); In re Sims, 148 B.R. 553, 557 (Bankr. E.D. Ark. 1992).

The debtor also argues that counsel specifically instructed him not to list some things. In particular, the debtor blames the failure to list his interest in The Simmons Company LLC, B & D

Family Partnership, B & D Family Investments, and Northeast Indiana Complete Construction Services, Inc. on the advice of counsel. According to the debtor, counsel said those interests were of no value, so he did not need to include them. Counsel is also to blame, according to the debtor, for the failure to list a Harley-Davidson Screaming Eagle. Counsel's deposition testimony, however, contradicts the debtor's version of events. Between the two, the court finds counsel's testimony that he would have instructed the debtor to "list everything and let the cards fall where they may" and that he "would not not list anything" to be the more credible. Hopper Deposition, Jan. 31, 2014, pg. 36. While the court agrees that counsel's performance when initiating this case and the procedures in his office were sloppy, it is not willing to extrapolate from that carelessness that counsel would consciously advise illegality. See, 18 U.S.C. § 152 (1), (2).

As for the failure to disclose transfers of the debtor's property, he claims it was an innocent mistake, because he believes a transfer only occurs when someone gives you property to hold and later return to them. Because of his unique definition of the word, he did not believe the guns, gun safe, campground lot, 2004 Ford F-350 truck, or 1999 camper needed to be mentioned; he did not consider them to have been transferred. They had been sold or given away; he no longer had any interest in them and they no longer mattered. The court is incredulous that the debtor is either that stupid (he is a high school graduate and since graduating has taken some engineering classes) or thinks the court is so gullible as to believe this explanation. The word "transfer" is not a legal term of art. It is a common word, used in a variety of situations and is not confined to the exceedingly narrow definition the debtor claims for it.⁸

⁸Although defined in the Bankruptcy Code, 11 U.S.C. § 101(54)(D) (each mode . . . of disposing with . . . property; or an interest in property), that definition simply puts in a bankruptcy context any common definition of the term. See e.g., Webster's Ninth New Collegiate Dictionary

While failure to disclose one item may not be sufficient to deny the debtor a discharge, a pattern of such failures is more than sufficient to do so. In re Rosenzweig, 237 B.R. 453, 457 (Bankr. C.D. Ill. 1999); In re Clawson, 119 B.R. 851, 852 (Bankr. M.D. Fla. 1990); In re Muscatell, 113 B.R. 72, 74 (Bankr. M.D. Fla. 1990). Here, the debtor not only failed to include many items on the schedules and statement of affairs, but also testified falsely at the § 341 meeting that he had read these documents, they were accurate and he owned no property other than what was listed. He failed to disclose a numerous items and transfers of property on the schedules and statement of affairs. The debtor is a high school graduate, has owned or operated various construction companies and was the manager of The Simmons Company LLC, making his supposed lack of sophistication and understanding not believable.

The best that can be said here is that the debtor exhibited a reckless disregard for the truth of the information provided. Ultimately, it is debtor who is responsible for the accuracy of the information contained in the bankruptcy schedules and statement of affairs, In re Dawley, 312 B.R. 765, 787 (Bankr. E.D. Pa. 2004); it is it the debtor who has the duty to carefully consider all of the questions posed and to see that they are completely and correctly answered. See, In re Sofro, 110 B.R. 989, 991 (Bankr. S.D. Fla. 1990) (citing In re Burke, 83 B.R. 716 (Bankr. D.N.D. 1988)). See also In re Dias, 95 B.R. 419, 424 (Bankr. N.D. Tex. 1988; In re Diodati, 9 B.R. 804, 808 (Bankr. D.

1252 (1988) (conveyance of right, title or other interest in real or personal property from one person to another); Oxford English Dictionary (to convey or take from one place, person, etc. to another). The term is not esoteric. It is regularly used in various contexts, including, for example: bank transfers, job transfers, balance transfers on credit cards, iron-on transfers, bus and plane transfers while traveling, transfer of body weight as used in various sports and fitness routines, file transfers on a computer, transfer from one phone extension to another, and the transfer of credits from one academic program to another. Given the debtor's claimed understanding of the term and its common usage in society, one wonders how he was able to function, particularly as the owner of various businesses.

Mass. 1981)). This debtor did not and there are consequences to such indifference. The debtor's discharge will be denied.

Judgment will be entered accordingly.

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