

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
JERRY LOUIS NEDOFF,) CASE NO. 03-64392 JPK
) Chapter 7
) Debtor.)
*****)
KENNETH A. MANNING,)
) Plaintiff,)
) v.) ADVERSARY NO. 04-6081
JERRY LOUIS NEDOFF,)
) Defendant.)

MEMORANDUM OF DECISION ON COMPLAINT TO DENY DISCHARGE

In this adversary proceeding, the plaintiff Kenneth A. Manning, as the Chapter 7 Trustee of the bankruptcy estate of Jerry Louis Nedoff ("Nedoff") in case number 03-64392, seeks to obtain a determination that Nedoff's discharge should be denied pursuant to provisions of 11 U.S.C. § 727(a).

The plaintiff ("Trustee") initiated this case by complaint filed on May 19, 2004. Nedoff appeared and filed an answer by and through his then-counsel Macarthur Drake. By order entered on September 23, 2004, Attorney Drake's representation of the defendant was terminated, with the consent of both parties to that representative relationship.

Trial was held to the bench on January 27, 2005. The Trustee appeared in person on his own behalf; Nedoff appeared *pro se*. Evidence and arguments of the parties were presented to the Court.

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157, and N.D.Ind.L.R. 200.1(a) of the Rules of the United States District Court for the Northern District of Indiana. This adversary proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(J).

The complaint proceeds on multiple grounds under 11 U.S.C. § 727(a), those being:

- A. 11 U.S.C. § 727(a)(2)(A);
- B. 11 U.S.C. § 727(a)(2)(B);
- C. 11 U.S.C. § 727(a)(3);
- D. 11 U.S.C. § 727(a)(4)(A); and
- E. 11 U.S.C. § 727(a)(4)(D).

For the reasons subsequently stated, the Court determines that the relief sought by the Trustee must be denied, and that Nedoff is therefore entitled to an order of discharge of indebtedness pursuant to 11 U.S.C. § 727(a).

I. DETERMINATION OF FACTS

The following facts have been established by the responses in Nedoff's answer to rhetorical paragraphs 5-9 of the Trustee's complaint:

1. Debtor was a Plaintiff in a state court cause of action and litigation, to-wit: Lake Superior Court; Cause No: 45 DO3 0003 CT 0012.
2. At the commencement of this case, Debtor had made a claim and demand for personal injuries against and upon one Alyson Merkner.
3. The personal injury claim, and state court cause of action, was a substantial and material asset of this estate.
4. The personal injury claim, and state court cause of action, was property of the Debtor at the commencement of this case, as that term (property) is used and defined under 11 USC 541.
5. Debtor wholly failed to list, schedule, or even mention the personal injury claim/state court cause of action, in his schedule of assets and/or statement of financial affairs.

The evidence conclusively establishes that there is no mention of any claim held by Nedoff for personal injuries in the documentation by which his Chapter 7 bankruptcy case was initiated. In response to section 4a of the Statement of Financial Affairs filed on September 10, 2003 in Nedoff's Chapter 7 case, the box "None" is checked in response to the direction to "(l)ist all suits and administrative proceedings to which the debtor is or was a party within one year

immediately preceding the filing of this bankruptcy case". Schedule B of the schedules filed on September 10, 2003 makes no reference of any kind to Nedoff's claim for personal injuries as potentially constituting property of his bankruptcy estate. Schedule F, also filed on September 10, 2003, lists no creditor having a claim for unpaid medical expense. At least one creditor believed it had such a claim, as evidenced by claim #4, filed on June 4, 2004, on the claims register of Nedoff's Chapter 7 case: a claim by CJ Yoon MD/Rehabilitation Medical Center for \$7,043.00, asserted by the claimant to represent expenses incurred by Nedoff as a result of an auto accident in which he was involved on March 9, 1999.

The Trustee's designated Exhibits 1, 2, 3, 4, 5 and 6 were admitted at the trial. These exhibits evidence the fact that a complaint was filed in Room 3 of the Lake Superior Court, sitting at Gary, Indiana, on March 21, 2000 on behalf of Jerry Nedoff and David Nedoff as plaintiffs, against Alyson R. Merkner and Erich B. Merkner, docketed as cause number 45D03-0003-CT-0012. This complaint, filed by Attorney Gus John Galanos as counsel for the plaintiffs, asserts that Nedoff was injured in an automobile accident which occurred on or about March 7, 1999, and that the designated defendants are responsible for the injuries which he sustained in that collision. These exhibits, coupled with the testimony of Attorney A. Leon Sarkisian, establish that at the date the petition initiating case number 03-64392 was filed, proceedings had been undertaken by Attorney Sarkisian as counsel for Nedoff in the personal injury action. Exhibits 2, 3 and 4 are letters from Attorney Sarkisian to Nedoff, each advising him of the status of the personal injury action and matters to be pursued further in it by Attorney Sarkisian. The evidence thus conclusively establishes that on the date of the filing of his bankruptcy petition, Nedoff was fully aware of the pendency of a personal injury action in which a claim for damages had been asserted on his behalf. The evidence also conclusively establishes that this claim was not disclosed by Nedoff in any documents which he filed in his bankruptcy case.

Nedoff testified at the trial that he advised his bankruptcy counsel Macarthur Drake of the matters relating to his personal injury action, including the identity of the attorneys who were representing him in that action. Nedoff states that he assumed that Attorney Drake prepared the initiating bankruptcy documentation based upon the information which he had provided to his counsel, and that he did not read any of the documents by which his case was initiated before he signed them, including section 4a of the Statement of Financial Affairs and Schedules B and F. Nedoff testified that at the time the case was filed on September 10, 2003 his personal injury action had not been settled and no amount of damages had been determined in it in his favor: on the date of the filing of the petition, Nedoff was the plaintiff in a personal injury action in which no recovery had yet been realized.

At the § 341 meeting conducted by the Trustee with respect to Nedoff, no direct questions were asked by the Trustee as to whether or not Nedoff had any pending personal injury claims or any pending litigation asserted on his behalf. The Trustee did ask Nedoff if he had any outstanding medical expenses, to which Nedoff replied in the negative. However, Nedoff in his testimony at the trial, stated that at the time of the examination it was his understanding that all medical expenses arising from the automobile accident had been paid for by his own insurance coverage. The aforesaid claim #4 of CJ Yoon MD establishes that an entity considered itself as having a claim against Nedoff for medical expenses; however, there is nothing in this record to establish that any asserted claim was in fact communicated to Nedoff by the provider of services.

Nedoff's personal injury claim was settled by Attorney A. Leon Sarkisian subsequent to the filing of Nedoff's Chapter 7 case. Settlement was under the authority and supervision of the Trustee, who was advised of the pendency of the claim by Attorney Sarkisian on or about January 21, 2004. After deducting expenses and attorney's fees incurred in resolving the claim, the total amount of the personal injury settlement proceeds was turned over to the Trustee to

be administered as an asset of Nedoff's Chapter 7 bankruptcy estate.

II. CONCLUSIONS OF LAW

The Trustee proceeds on five separate bases to seek to deny discharge pursuant to provisions of 11 U.S.C. § 727(a).

A. 11 U.S.C. § 727(a)(2)(A)

11 U.S.C. § 727(a)(2)(A) states:

(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, or has permitted to be transferred, removed, destroyed, mutilated, or concealed –

(A) property of the debtor, within one year before the date of the filing of the petition.

The basic criteria under which an action pursuant to § 727(a)(2)(A) is to be determined was stated as follows in *Village of San Jose v. McWilliams*, 284 F.3d 785, 790-791 (7th Cir. 2002):

The purpose of the Code is to provide equitable distribution of the debtor's assets to the creditors and "to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *Williams v. United States Fid. & Guar. Co.*, 236 U.S. 549, 554-55, 35 S.Ct. 289, 59 L.Ed. 713 (1915). We construe the Bankruptcy Code "liberally in favor of the debtor and strictly against the creditor." *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1292 (10th Cir.1997); *In re Reines*, 142 F.3d 970, 973 (7th Cir.1998); *In re Adlman*, 541 F.2d 999, 1003 (2d Cir.1976); 11 U.S.C. § 727(a) (providing that, "[t]he court shall grant the debtor a discharge, unless ..."). Thus, consistent with the Code, bankruptcy protection and discharge may be denied to a debtor who was less than honest. *Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) ("But in the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.' ") (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934)); *Mayer v. Spanel Int'l Ltd.*, 51 F.3d 670, 674 (7th Cir.1995)

("Congress concluded that preventing fraud is more important than letting defrauders start over with a clean slate, and we must respect that judgment."). If a creditor demonstrates by a preponderance of the evidence that the debtor actually intended to hinder, delay, or defraud a creditor, the court can deny the discharge. See *In re Keeney*, 227 F.3d 679, 683 (6th Cir.2000); *In re Scott*, 172 F.3d 959, 966-67 (7th Cir.1999); cf. *Grogan*, 498 U.S. at 286-87, 111 S.Ct. 654. The intent to defraud must be actual and cannot be constructive; however, because it is unlikely that the debtor will admit fraud, intent may be established by circumstantial evidence. See *In the Matter of Krehl*, 86 F.3d 737, 743-44 (7th Cir.1996); *Smiley v. First Nat'l Bank of Belleville (In the Matter of Smiley)*, 864 F.2d 562, 566 (7th Cir.1989).

B. Objections to Discharge Based on Section 727(a)(2)

In order to succeed with an objection to discharge based on section 727(a)(2), the creditor must prove:

- (1) that the act complained of was done at a time subsequent to one year before the date of the filing of the petition;
- (2) with actual intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under the Bankruptcy Code;
- (3) that the act was that of the debtor or his duly authorized agent;
- (4) that the act consisted of transferring, removing, destroying or concealing any of the debtor's property, or permitting any of these acts to be done.

Lee Supply Corp. v. Agnew (In the Matter of Agnew), 818 F.2d 1284, 1287 (7th Cir.1987) (citation omitted).

The Trustee's action under § 727(a)(2)(A) fails as a matter of law: there is no evidence whatsoever of any action on the part of Nedoff to "transfer, remove, destroy, mutilate or conceal" his claim for damages arising from personal injury from any creditor or from an officer of his bankruptcy estate prior to the filing of his petition.

B. 11 U.S.C. § 727(a)(2)(B)

11 U.S.C. § 727(a)(2)(B) states:

(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, or has permitted to be transferred, removed, destroyed, mutilated, or

concealed –
(B) property of the estate, after the date of the
filing of the petition;

The same elements of proof and analytical framework as stated in the preceding section with respect to § 727(a)(2)(A) are applicable to proceedings under § 727(a)(2)(B), with the sole exception that the acts performed by the debtor must relate to property of the bankruptcy estate after the date of the filing of the petition as opposed to acts occurring in the one-year period prior to the filing of the petition.

Without question, the record establishes that Nedoff's claim for personal injuries was an asset of his bankruptcy estate; that the claim was not disclosed in any of the documents by which his case was initiated; and that the claim only came to the Trustee's attention when Attorney A. Leon Sarkisian advised him of it. However, the critical issue is one of Nedoff's intent, and it is in this context that the Trustee's action fails. The Court finds that the evidence is insufficient to establish that Nedoff had actual intent to hinder, delay or defraud any creditor or the Trustee with respect to the fact that his claim for personal injuries does not appear in the record of his case. The Court finds credible Nedoff's testimony that he advised his bankruptcy counsel of matters relating to this claim in advance of the preparation of the initiating documentation filed in his case, and that he assumed that pertinent information regarding that matter had been stated as necessary in the bankruptcy documentation prepared by that counsel. While it is certainly true that an individual is held to be responsible for the statements made under oath in documents signed by him under penalty of perjury, whether or not he has reviewed those statements, the evidence in this case establishes only that Nedoff was negligent in failing to review the documentation before it was filed with the Court by his bankruptcy counsel: it does not establish the necessary intent. The Court also finds credible Nedoff's statements that he was not aware of the claims of any creditor with respect to medical expenses at the time this case was filed. At trial, the Trustee acknowledged that he did not ask

Nedoff any direct questions about the existence of any claim which might give rise to recovery on his part, and there is thus nothing in this record to establish that Nedoff responded evasively or untruthfully to a question about the asset which the Trustee now asserts he failed to disclose.

C. 11 U.S.C. § 727(a)(3)

11 U.S.C. § 727(a)(3) states:

- (a) The court shall grant the debtor a discharge, unless –
 - (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

The Court finds as a matter of law that the evidence adduced at trial does not in any manner establish a ground under this statute. There is no evidence that the Trustee asked for documentation from Nedoff with respect to his personal injury action. The information regarding that action was fully provided to the Trustee by Attorney A. Leon Sarkisian, and the Trustee exercised complete control over the settlement of the personal injury action after that disclosure.

D. 11 U.S.C. § 727(a)(4)(A)

11 U.S.C. § 727(a)(4)(A) states:

- (a) The court shall grant the debtor a discharge, unless –
 - (4) the debtor knowingly and fraudulently, in or in connection with the case –
 - (A) made a false oath or account;

The basis elements of an action under 11 U.S.C. § 727(a)(4) have been well set out in *In re Costello*, 299 B.R. 882, 899-900 (Bankr. N.D.Ill. 2003):

Section 727(a)(4)(A) provides that the court may not grant a debtor a discharge if: "(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). The burden of proof lies with the objecting creditor to establish five elements: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with intent to defraud; and (5) the statement related to the bankruptcy case in a material way. *Bailey*, 145 B.R. at 926; *Bank of India v. Sapru (In re Sapru)*, 127 B.R. 306, 314 (Bankr.E.D.N.Y.1991). Although the burden of proof rests on the creditor at all times, the debtor cannot prevail if he is unable to offer credible evidence after the plaintiff has established a prima facie case. *Sapru*, 127 B.R. at 316 (citation omitted).

The purpose of § 727(a)(4) is to ensure that the debtor provides dependable information to those who are interested in the administration of the bankruptcy estate. *Madonia v. Hasan (In re Hasan)*, 245 B.R. 550, 554 (Bankr.N.D.Ill.2000); *Brandt v. Carlson (In re Carlson)*, 231 B.R. 640, 655 (Bankr.N.D.Ill.1999). The debtor must disclose all ownership interests he holds in property. *Allard v. Hussan (In re Hussan)*, 56 B.R. 288, 292 (Bankr.E.D.Mich.1985). "The trustee and creditors are entitled to honest and accurate signposts on the trail showing what property has passed through the [d]ebtor's hands during the period prior to his bankruptcy." *Id.*, quoting *Guardian Indus. Products, Inc. v. Diodati (In re Diodati)*, 9 B.R. 804, 807 (Bankr.D.Mass.1981). It is not the debtor's responsibility to decide which assets are to be disclosed to creditors; rather, his job is simply to address each question and answer it accurately and completely. *Id.* (citation omitted).

The first thing that an objecting creditor must establish is that the Debtor made a statement under oath. Bankruptcy schedules and statements of financial affairs constitute statements under oath. *Northeast Fed. Credit Union v. Garcia (In re Garcia)*, 260 B.R. 622, 631 (Bankr.D.Conn.2001); *Senese*, 245 B.R. at 575 (finding that any statement made in a bankruptcy petition, schedule, or statement of financial affairs falls within the meaning of § 727(a)(4)(A)); *In re Bailey*, 53 B.R. 732, 735 (Bankr.W.D.Ky.1985) (noting that a false oath may consist of a false statement or omission in a debtor's schedules). In addition, testimony at a Federal Rule of Bankruptcy Procedure 2004 Examination is a statement under oath under § 727(a)(4). *Garcia*, 260 B.R. at 631.

A creditor must next show that the statements made by the debtor were false. Whether the debtor made a false oath within the meaning of § 727(a)(4) is a question of fact. *Williamson v. Fireman's Fund Ins. Co.*, 828 F.2d 249, 251 (4th Cir.1987); *Bailey*, 145 B.R. at 926. Filing bankruptcy schedules with material misrepresentations or omissions to mislead creditors about the

debtor's financial situation constitutes a false oath. *Britton Motor Serv., Inc. v. Krich (In re Krich)*, 97 B.R. 919, 923 (Bankr.N.D.Ill.1988) (citation omitted). Although not every single item need be scheduled and valued, "there comes a point when the aggregate errors and omissions cross the line past which a debtor's discharge should be denied." *Stathopoulos v. Bostrom (In re Bostrom)*, 286 B.R. 352, 360-61 (Bankr.N.D.Ill.2002) (citations omitted).

Further, a debtor cannot excise a false oath by making subsequent corrections to his bankruptcy petition. *Bensenville Community Ctr. Union v. Bailey (In re Bailey)*, 147 B.R. 157, 165 (Bankr.N.D.Ill.1992) (citation omitted) ("Subsequent voluntary disclosure through testimony or an amendment to the schedules cannot expunge the falsity of an oath."). Allowing a debtor to submit false schedules and then, on discovery, avoid the negative consequences of his dishonesty by amending those schedules "is contrary to the spirit of the law which aims to relieve honest debtors only." *Hussan*, 56 B.R. at 293. " 'The operation of the bankruptcy system depends on honest reporting. 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.' " *Rogers v. Boba (In re Boba)*, 280 B.R. 430, 435-36 (Bankr.N.D.Ill.2002), quoting *Payne v. Wood*, 775 F.2d 202, 205 (7th Cir.1985); *Mazer v. United States*, 298 F.2d 579, 582 (7th Cir.1962).

After the creditor has demonstrated that the debtor made false statements, he must establish that these statements were made knowingly and fraudulently. As in § 727(a)(2)(A), direct evidence of intent to defraud is seldom available. Fraudulent intent must be inferred from circumstantial evidence or by inferences based on a course of conduct. *Bailey*, 145 B.R. at 928; *Nat'l Post Office Mail Handlers, Watchmen, Messengers & Group Leaders v. Johnson (In re Johnson)*, 139 B.R. 163, 169 (Bankr.E.D.Va.1992). Moreover, if a debtor's bankruptcy schedules and statements indicate that the debtor is recklessly indifferent to the truth, the objecting creditor does not have to offer any additional evidence of fraud. *In re Johnson*, 139 B.R. at 166 (citation omitted) (noting that courts recognize that a reckless indifference to the truth is "the functional equivalent" of fraud); *Bailey*, 145 B.R. at 928 (citations omitted) ("The cumulative effect of a number of false oaths by the debtor with respect to a variety of matters establishes a pattern of reckless and cavalier disregard for the truth by the debtor."); *Calisoff v. Calisoff (In re Calisoff)*, 92 B.R. 346, 355 (Bankr.N.D.Ill.1988).

Finally, the creditor must show that the false statements made by the debtor relate materially to the bankruptcy case. A statement is

considered material for purposes of § 727(a)(4) if it relates to the debtor's estate, involves the discovery of assets, or concerns the disposition of the debtor's property or his entitlement to discharge. *Williamson*, 828 F.2d at 251; *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 618 (11th Cir.1984) (citations omitted); *Netherton v. Baker (In re Baker)*, 205 B.R. 125, 133 (Bankr.N.D.Ill.1997).

In this case, the Court finds that the evidence of record fails to establish that Nedoff "knowingly and fraudulently" made a false oath in his initial bankruptcy filings by the omission therefrom of any mention of his claim for personal injuries. Nedoff testified that he disclosed the existence of, and matters relating to, his personal injury claim to his bankruptcy counsel, and that he relied upon his bankruptcy counsel to state in the initiating bankruptcy documents any and all pertinent information required to be expressed therein. He did not read these documents before he signed them under oath. No communication with the Trustee at the § 341 meeting would have alerted him to the need to disclose information concerning his personal injury claim to the Trustee at that time. While it is certainly negligent to sign documents under oath without fully reviewing them, again, negligence is not the standard under § 727(a)(4) – there must be an actual knowing and fraudulent intent.

E. 11 U.S.C. § 727(a)(4)(D)

11 U.S.C. § 727(a)(4)(D) states:

(a) The court shall grant the debtor a discharge, unless –

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

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

The elements required to sustain an action under the foregoing section are essentially those required under § 727(a)(4)(A), with the exception that the act referred to in § 727(a)(4)(D) is the withholding of information, rather than the making of a false oath.

Again, as was true with the Trustee's action under § 727(a)(3), the facts of this case do

not really fit this asserted cause of action in any manner. The form of information which is the subject of § 727(a)(4)(D) is recorded information. The basic assertions in this case are that Nedoff failed to disclose the existence of a claim for personal injuries in his initiating bankruptcy documentation. The initial filings in this case did not require the provision at the inception of the case of any recorded information relating to the claim for personal injuries, and the evidence establishes that the Trustee never directly requested that Nedoff provide any such documentation to him. The evidence in this case simply will not sustain an action under § 727(a)(4)(D).

III. CONCLUSION

This case presents a fact situation in which the debtor's schedules clearly did not disclose the existence of his claim for personal injuries in the documentation by which his Chapter 7 case was initiated. That claim was a significant asset of his Chapter 7 bankruptcy estate, and thus the omission of it from the initial filings was a material omission. However, having weighed the evidence presented at trial, the Court finds that the fact that information concerning Nedoff's personal injury claim was not disclosed in documentation filed on his behalf in this case was not the result of either intentional fraudulent conduct on the part of Nedoff, or of knowing and fraudulent conduct on his part.

IT IS ORDERED, ADJUDGED AND DECREED that the Trustee's complaint to deny discharge is denied, and that Nedoff is entitled to the entry of discharge pursuant to 11 U.S.C. § 727(a) in case number 03-64392.

Dated at Hammond, Indiana on February 4, 2005..



J. Philip Klingeberger
United States Bankruptcy Court

Distribution:
Plaintiff, Defendant