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JUDGE: M. A. Mahoney
PARTIES: William B. Toomey, Robbie D. Toomey, First National Bank of Atmore
CHAPTER: 7
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

WILLIAM B. TOOMEY
ROBBIE D. TOOMEY Case No. 99-11575-MAM-7

Debtors

FIRST NATIONAL BANK OF ATMORE

Plaintiff

vs. Adv. No. 99-1163

WILLIAM B. TOOMEY and
ROBBIE D. TOOMEY

Defendants

ORDER AND JUDGMENT GRANTING DISCHARGE TO DEFENDANTS

This case is before the Court on the complaint of the First National Bank of Atmore (the Bank) seeking a determination pursuant to 11 U.S.C. § 727 that the discharge of the debtors, William B. Toomey and Robbie D. Toomey, should be denied. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court is denying the complaint of the Bank and is granting a discharge to the debtors.

FACTS

The debtors filed their chapter 7 case on May 3, 1999. In their schedules, they listed a 1951 Ford truck, a John Deere back hoe and a 26' trailer. The schedules listed the value of the

truck at $800. The trailer and backhoe were valued at $15,000. The truck and trailer and back hoe were listed as "in debtor possession." The schedules were never amended.

On July 2, 1999, the Bank filed a motion seeking to lift the stay against the truck, back hoe and trailer. On August 10, 1999, debtors' counsel and the Bank counsel appeared and the debtor consented to relief from stay as to the items. The order was signed by the Court on August 12, 1999.

The parties do not dispute that the Bank had a valid, perfected lien on the collateral. In August 1999, the loan on the truck had a principal balance of $2,695.64. It had originally had a balance of $5,000. The trailer and back hoe were on a separate loan taken out in 1996. The remaining payoff on the back hoe/trailer loan is $5,510.07. This is after the sale of the back hoe by the Bank for $13,500.

The truck was in excellent condition when the loan was incurred. The debtor testified that "the engine blew" in March or April of 1998. He had used the truck for work after he had started his own business. The tires were bad and the paint job was ruined by the time of the engine problem as well. He sold the truck for $400 to a nonrelated third party on an unspecified date after the engine quit working. He did not tell the Bank about the sale. He did not turn over the $400 to the Bank. Mr. Toomey thinks he "relayed in passing" to the Bank that he was going to have to sell the truck after the engine blew.

The trailer and back hoe were returned to the Bank after the relief from stay order was signed. When the loan was incurred in 1996, the back hoe was worth over $25,000.
Mr. Toomey believes the back hoe was still worth more than the amount remaining on the loan at the time he turned it in in 1999. The trailer was a homemade one. Mr. Toomey says that he had the same trailer in 1996 and in 1999. At the time of the loan, the Bank never looked at the

trailer but put it on the loan as collateral. The trailer is 26' long according to the manner of measurement used by the debtor. The debtor asserts that the trailer is worth about $500.

The Bank, through the testimony of a loan officer, admits that it never viewed the trailer. However, it obtained a vehicle identification number from the debtor and a vehicle tag receipt bearing that same number. Since the trailer was turned over, the Bank has not been able to find any vehicle identification number on the trailer. The Bank has been offered $300-$600 for it.

The debtors went to counsel to file their chapter 7 case. Mrs. Toomey took the information to the attorney's office. The debtors thought that they had to list all of the collateral for their debts on the schedules even if they did not have it. They did not intend to defraud anyone. They did sign their petition under oath.

LAW

To maintain an action under § 727 of the Bankruptcy Code, the plaintiff bears the burden of proving that the debtors should be denied a discharge of all of their debts for one of the reasons stated in the code section. The Bank must prove this by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991). "Objections to discharge are to be strictly construed against the . . . [plaintiff] and liberally in favor of the Debtor." *Goldberg v. Lawrence (In re Lawrence)*, 227 B.R. 907, 915 (Bankr. S.D. Fla. 1998).

A discharge is a privilege, not a right. Debtors must do what is required to deserve it. *In re Lawrence*, *id*. at p. 915. Denial of a discharge is an extreme step which is not to be taken lightly by the court. *U.S. v. Haught (In re Haught)*, 207 B.R. 269 (Bankr. M.D. Fla. 1997).

The Bank did not specify in its complaint which sections of 11 U.S.C. § 727 it believes the debtors violated. The Court concludes from the evidence that there are three possibly relevant sections--§§ 727(a)(2)(A), 727(a)(4), and 727(a)(5). Section 727 (a)(2)(A) states that a

discharge shall be denied if the debtors, "with intent to hinder, delay, or defraud creditors," transfer or destroy property within one year before the bankruptcy filing. Section 727(a)(4) indicates that a discharge should be denied if a debtor makes a false oath. Section 727(a)(5) states that a debtor's discharge should be denied if a debtor fails to explain satisfactorily any loss of assets. The Court will discuss each section below.

SECTION 727(a)(2)(A)

Section 727(a)(2)(A) states that the court shall not grant the debtor a discharge if "the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred . . . [or] destroyed property of the debtor, within one year before the date of the filing of the petition." The Bank must prove that (1) the Toomeys sold their truck or disposed of their trailer (2) with an intent to hinder, delay, or defraud the Bank or trustee, and (3) the sale of the truck or disposal of the trailer was on or after May 3, 1998. *Wolfdiam, P.V.B.A. v. Wainsztein (In re Wainsztein)*, 117 B.R. 742 (Bankr. S.D. Fla. 1990).

As to the truck, Mr. Toomey testified that he sold it early in 1998. The evidence suggested that it occurred in March or April 1998 because that is when the engine became inoperative. The bank officer's testimony was also that he saw the truck around town "until 1998" which is consistent with a sale by the debtors in early 1998. If the truck was sold in March or April 1998, then this section of the Bankruptcy Code does not even apply to the truck.

Even assuming that the truck was sold after May 3, 1998, the complaint of the Bank as to the truck should be denied as to this code section. The Bank had to prove that the Toomeys intended to hinder, delay, or defraud the Bank by the sale. The intent must be actual, not implied intent. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 306-07 (11th Cir. 1994). In this case, Mr. Toomey needed a new truck when the 1951 Ford truck quit working. The truck was no

longer of any use to him and was in bad condition. The evidence did not reveal what he used the sales proceeds for, but it is at least possible he used them to help purchase a new truck. The sale had none of the "badges of fraud" surrounding it which courts use to find intent, i.e., the transfer was not to a family member; the consideration was adequate for the condition of the truck; the debtor did not retain the use of the truck; and there was no evidence offered of a scheme or of bankruptcy estate planning. Finally the $400 sales price or value is not substantial. To deny a discharge over $400 is excessive without any other showing of intent or malice or bad faith. *Crews v. Topping (In re Topping)*, 84 B.R. 840, 842 (Bankr. M.D. Fla. 1988).

As to the trailer, the evidence is even slimmer. The debtors and the bank officer disagree about whether the trailer turned over to the Bank is the same trailer as the debtors had at the time the loan was incurred. The debtors testified it was; the bank officer said it was not. The bank officer believed that the trailer had to be a substitute of lesser value because the Bank had obtained a vehicle identification number (VIN) for the trailer at the time of the loan. When the trailer was turned over to the Bank in August or September 1999, the Bank could not locate a VIN. However, the Bank never viewed the collateral at the time the loan was made. Without more, the Bank cannot sustain its burden of proof that the trailer which was collateral for its loan was sold or otherwise disposed of. The evidence is at best in equipoise.

For all of the reasons given above, the Court concludes that neither the truck nor the trailer were sold or transferred in a manner requiring denial of discharge under § 727(a)(2)(A).

SECTION 727(a)(4)

Section 727(a)(4) requires denial of discharge if the debtor "knowingly and fraudulently . . . made a false oath." The debtors signed their schedules under penalty of perjury. The schedules list the truck and trailer. The schedules placed a value on the truck of $800. The

schedules stated that the truck was "in debtor possession." The schedules were never amended. The Bank filed a relief from stay motion. The Bank was never told that the truck had been sold until after it got the order granting it relief from the stay.

The debtors filled out the bankruptcy forms at their counsel's office. They asserted that they were mistaken about what the forms meant. They thought they were supposed to list all loans and the items which were collateral for the loans.

To be actionable under § 727(a)(4), the falsity must be intentional. *Firstar Bank Iowa, N.A. v. Magnani (In re Magnani)*, 223 B.R. 177 (Bankr. N.D. Iowa 1997). The falsity must also be material. *Sears v. Burrell (In re Sears)*, 225 B.R. 270 (Bankr. D.R.I. 1998). In this case, neither proposition is true.

The debtors, in essence, rely on an advice of counsel defense. Advice of counsel, if it is reasonable to have relied on the advice, is a valid excuse for incorrect forms. *Case v. Cheek (In re Cheek)*, 157 B.R. 1003, 1024-25 (Bankr. E.D. Mo. 1993). The debtors' counsel himself argued that the debtors misunderstood what they were to do. He also argued that such errors are "common" when filling out forms with the help of a secretary or paralegal. Counsel also stated (although not under oath) that debtors testified that the truck had been sold at their first meeting of creditors. Counsel also stated that he should have done an amendment to the schedules, but he did not.

Because the Toomeys' belief is reasonable, and because debtors' counsel, in argument, basically admitted that he knew of the misstatement, the defense is credible. The Toomeys did not intentionally lie on their schedules and make a knowingly false oath. Therefore, denial of a discharge under § 727(a)(4) is denied.

SECTION 727(a)(5)

Section 727(a)(5) denies a discharge to a debtor who has failed "to explain satisfactorily . . . any loss of assets." As stated above, the Court finds credible the Toomeys' explanation of their truck sale and the trailer. There is no unexplained asset loss. *Sulphur Partnership v. Piscioneri (In re Piscioneri)*, 108 B.R. 595, 604 (Bankr. N.D. Ohio 1989); *Chicago Title Ins. Co., Inc. v. Mart (In re Mart)*, 87 B.R. 206 (Bankr. S.D. Fla. 1988). Therefore, § 727(a)(5) does not apply.

CONCLUSION

The Court is troubled by the facts of this case. The debtors, in large part, had this adversary case filed and tried because counsel did not help prepare the forms correctly. His argument and the Toomeys' testimony lead the Court to believe that a secretary or paralegal helped with the forms without his guidance. Additionally, counsel admitted that, at the first meeting of creditors, the debtors testified that they did not have the truck. Yet no amendment was filed, even after the Bank had filed this case. It also appears that debtors' counsel did not tell the Bank that the truck had been sold even when the relief from stay motion had been filed.

Debtors should not have been put in the position of barely escaping denial of their discharge when their attorney knew early in the case that the truck, which was a basis for the complaint, was not available. Counsel could have corrected the schedules and/or talked to the Bank's counsel. Furthermore, debtors' counsel, in all cases, should go over debtors' schedules with them and provide careful guidance to any staff who are preparing forms. Debtors, debtors' counsel, the Bank and its counsel, and the Court all paid a high cost for counsel's failure to communicate. The Court, by separate order, will show cause debtors' counsel as to why the attorneys fee paid to counsel should not be disgorged and paid to the debtors or to their estate.

THEREFORE, IT IS ORDERED AND ADJUDGED that the complaint of First National Bank of Atmore seeking denial of the discharge of William B. Toomey and Robbie D. Toomey is DENIED.

Dated: February 2, 2000

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MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

WILLIAM B. TOOMEY
ROBBIE D. TOOMEY Case No. 99-11575-MAM-7

Debtors

ORDER TO DEBTOR'S COUNSEL TO SHOW CAUSE WHY HE SHOULD NOT BE ORDERED TO DISGORGE HIS ATTORNEYS' FEE

The Court has issued an order denying a complaint objecting to the debtors' discharge in this case. The testimony revealed that either the debtors were not being truthful, or they had not been counseled at all or enough about the proper manner to complete their bankruptcy forms. The testimony also revealed that the objecting creditor had not been told about the absence of an item of its collateral until after a relief from stay order was entered and a complaint to deny discharge was filed. Debtors' counsel argued at the trial of the Section 727 discharge complaint that the debtors had not understood how to fill out their bankruptcy forms and that was a "common" error. He also indicated that a secretary or paralegal had assisted the debtors in completing the forms. Finally counsel indicated that he knew as early as the first meeting of creditors that the collateral did not exist, but did not amend the schedules. He also apparently did not advise counsel for the lien creditor of that fact. For these reasons, the Court has concluded that a hearing on the appropriate fee which should be awarded to debtors' counsel is warranted in this case.

IT IS ORDERED that Stephen K. Orso shall appear and show cause why the attorneys' fees paid to him by the debtors in this case should not be disgorged to the debtors or to the

trustee. The hearing shall be held on **February 15, 2000 at 8:30 a.m.** in Courtroom 2, United States Bankruptcy Court, 201 St. Louis Street, Mobile, AL 36602.

Dated: February 2, 2000

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MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE