UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE:

TODD D. STALNAKER, CASE NO. 03-40936-PNS3

Debtor. Chapter 7

FORD MOTOR CREDIT COMPANY,

Plaintiff,

v. ADV. PROC. NO. 03-80041

TODD D. STALNAKER,

Defendant.

ORDER DENYING RELIEF SOUGHT IN PLAINTIFF'S COMPLAINT PURSUANT TO 11 U.S.C. §727(a)(3) AND §727(a)(4)

Kenneth Mather, Counsel for Ford Motor Credit Company
John Venn, Counsel for Todd D. Stalnaker

This matter is before the court on the Plaintiff's complaint seeking denial of the Debtor's discharge pursuant to 11 U.S.C. §§727(a)(3), (a)(4) and (a)(5). The Court has jurisdiction to hear this matter 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). After due consideration of the pleadings, briefs, evidence, testimony and arguments of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Debtor, Dr. Todd D. Stalnaker ("Stalnaker"), is an obstetrician and gynecologist

practicing in Pensacola, Florida. His father, B.L. Stalnaker is also a doctor. B.L. Stalnaker retired from the practice of medicine and, in 1999, became involved as a financial partner in two automobile dealerships, one in Gulfport, Mississippi and one in Ocean Springs, Mississippi. Warren Culbertson ("Culbertson") was B.L. Stalnaker's partner in the car dealerships. In June 2000, B.L. Stalnaker and Culbertson ended their association in the Mississippi dealerships. Culbertson took the Gulfport dealership and B.L. Stalnaker took the Ocean Springs dealership. To get a release from the mortgage holder on the Ocean Springs property, B.L. Stalnaker needed another guarantor to replace Culbertson. He asked Stalnaker, who agreed to guarantee the debt to help his father. Stalnaker acquired a 25% interest in Stalnaker and Stalnaker LLC.

In late 1999 or early 2000, B.L. Stalnaker and Culbertson decided to purchase a Mazda franchise in Pensacola, Florida. B.L. Stalnaker asked Stalnaker get involved in the deal and Culbertson included his brother-in-law, Mark Bonifay ("Bonifay"). The group formed Astro Imports of Florida, Inc. ("Astro Imports-Florida") to complete the deal. In January 2000, Stalnaker prepared a financial statement for the Plaintiff, Ford Motor Credit ("Ford"), to obtain financing for the Mazda franchise. Stalnaker testified at trial that he prepared the financial statement himself using his financial records. He listed personal property (jewelry, art, etc.) with a value of $200,000.00. He listed cash in the amount of $250,000.00; $200,000.00 of the cash was held as a certificate of deposit. The certificate was later used to pay a loan related to one of the car dealerships and to buy out Bonifay when he left the car dealership.

Ford entered into a loan and security agreement with Astro Imports-Florida for a principal amount of $775,000.00 as well as a wholesale plan, a continuing guarantee and capital loan guaranty agreement on March 31, 2000. Stalnaker signed as a guarantor of this debt. He also

signed one or more guarantees of the floor plan and line of credit for the business. He also signed as a guarantor of the mortgage on the dealership property on Navy Boulevard ("Navy Boulevard property"). Stalnaker borrowed $200,000.00 from Whitney Bank for the business. The funds were placed in Stalnaker's personal account at Whitney and then immediately paid to the dealership by cashier's check. Stalnaker pledged a $200,000.00 certificate of deposit to secure the loan. Culbertson later ended his association with the Mazda franchise, leaving the business to Stalnaker, B.L. Stalnaker and Bonifay. Bonifay Stalnaker LLC was created at this time. The entity later became Stalnaker Family LLC after Stalnaker and B.L. Stalnaker bought out Bonifay's interest in the car dealerships. Stalnaker then owned 50% of Stalnaker Family LLC.

B.L. Stalnaker and Bonifay pursued an additional location for the Mazda franchise. Bonifay-Stalnaker, LLC purchased land and a building on Highway 29 ("Highway 29 property") in Pensacola, Florida. Ford financed the purchase of this property; Bonifay, B.L. Stalnaker and Stalnaker signed guarantees for the debt.

In November 2000, Bonifay approached B.L. Stalnaker about selling his interest on an emergency basis. Bonifay stated that the sale was for personal reasons. B.L. Stalnaker agreed to buy out Bonifay, and asked Stalnaker to help him finance the buy out. Stalnaker borrowed $100,000.00 from Whitney Bank and signed additional loan guarantees to help his father obtain the money to buy out Bonifay's interest. When B.L. Stalnaker took control of the business, he discovered that the business had severe financial difficulties. The dealership was "out of trust" with Ford for the automobiles sold, and it had substantial trade debt. After exhausting his own financial resources, B.L. Stalnaker again turned to Stalnaker for financial help. In June 2001,

Stalnaker invested $100,000.00 in the dealership. To obtain the funds, Stalnaker cashed in the $200,000.00 certificate of deposit that he had previously pledged to Whitney Bank. He used $100,000.00 to pay Whitney for the loan he had secured to buy out Bonifay, and $100,000.00 was deposited in the dealership account.

Stalnaker decided to disassociate himself from the automobile business in the spring and summer of 2001. He entered into an agreement with B.L. Stalnaker wherein the Navy Boulevard property would be transferred to Stalnaker in exchange for Stalnaker's interests in the entities owning the property and operating the dealership on Highway 29. James L. Chase, an attorney practicing in Pensacola, Florida, prepared the deed for transferring the Navy Boulevard property. Chase's letter of June 18, 2001 outlines his instructions from B.L. Stalnaker. As a result of this agreement, Stalnaker received the Navy Boulevard property and he signed over stock certificates in the various interests. He transferred his 25% interest in Astro Imports of Florida by endorsing the stock certificates in blank. Chase testified that no other documents were needed to complete the transaction. Stalnaker's tax returns for 2002 and the following years do not list holdings in Stalnaker Family LLC. Stalnaker and the other entities involved did not seek Ford's permission to transfer the property to Stalnaker pursuant to the mortgage on the property. Stalnaker planned to sell the Navy Boulevard property to recoup some of his losses. His father-in-law, who was a realtor, had a tenant for the property for the Navy Boulevard property, but Ford would not give its permission for Stalnaker to sell or lease the property. Ford eventually foreclosed on the Navy Boulevard property.

Eventually, the dealership became unable to pay its creditors. Stalnaker began to receive demands on guarantees from the Bank of Pensacola and Whitney Bank. Ford filed suit against

him. Stalnaker sought legal advice from Bill Bond, a Pensacola attorney who specializes in commercial transactions. Bond attempted to work out agreements with Stalnaker's creditors. Stalnaker did reach a settlement with the Bank of Pensacola wherein he paid $75,000.00, approximately one third of the total debt that was owed to Bank of Pensacola. Stalnaker paid the funds on June 18, 2002 and received a release. The release did not apply to the other guarantors, Bonifay and B.L. Stalnaker. The Bank's representative, Roger Huffman, testified at trial that B.L. Stalnaker also paid $75,000.00 to settle the Bank of Pensacola's claims against him. Bond testified that Stalnaker had no right of contribution against B.L. Stalnaker and Bonifay. Stalnaker testified that he had no discussions about a possible right of contribution and was not aware of this right.

Astro Imports-Florida and Stalnaker are in default under the terms and conditions of the wholesale plan, the capital loan and guaranty agreement with Ford. The deficiency balance owed by Astro Import- Florida is $1,326,490.48 as of January 23, 2003.

At Bond's suggestion, Stalnaker also sought the advice of Tom Reed ("Reed"), an experienced bankruptcy attorney in the Pensacola area. Stalnaker met with Reed at his office approximately five times and talked to Reed on the telephone on numerous occasions. At one of the initial visits, Stalnaker filled out an "input sheet" about his financial affairs to assist Reed in preparing the bankruptcy schedules. Reed testified at trial that he did not realize that there were two distinct LLC entities, even though he had reviewed documents relating to the sale of the Mississippi property by Stalnaker and Stalnaker LLC.

Stalnaker filed his chapter 7 petition on March 31, 2003. Stalnaker listed a 25% interest in the Stalnaker Family LLC on schedule B of his petition. Stalnaker now states that his interest

in this entity was transferred prior to the filing of his bankruptcy. At his first meeting of creditors, Stalnaker testified that his 25% interest in Stalnaker Family LLC was related to the Mississippi property. He did not list the $75,000.00 settlement in his schedules or statement of affairs. Reed testified that he knew about the Bank of Pensacola settlement, but did not believe that it had to be listed in Stalnaker's statement of affairs or schedules. Stalnaker's petition listed personal property worth $20,000.00, not the $200,000.00 as provided in the financial statement that Stalnaker furnished to Ford in 2000.

Stalnaker responded to question 3(a) of the Statement of affairs, which requires a debtor to list all payments aggregating more than $600.00 made within 90 days of filing of the bankruptcy petition, with "usual monthly payments." Stalnaker and his wife paid their bills, including credit card bills, in full each month. Reed testified that he produced the answer to 3(a) based on the Stalnaker's bill paying system. He knew that the bankruptcy did not have much consumer debt and answered the question accordingly. Reed also stated that this response is common for the Northern District of Florida in cases where regular, monthly bills were paid on a current basis. Reed also testified that he does not list as creditors entities with bills that are paid, even if the bill is a recurring debt, such as a utility bill that is paid current.

In 2002, Stalnaker paid his father $6,000.00. Stalnaker made one $3,000.00 payment on March 5, 2002, and another $3,000.00 payment on April 1, 2002. The March 5, 2002 was made more than one year before the filing of the bankruptcy petition and was not required to be listed. The April 1, 2002 payment was not listed in Stalnaker's schedules or statement of affairs. Stalnaker told Reed about the payments to his father. Reed testified that Stalnaker told him that the payments were for surgical assistance that B.L. Stalnaker would perform in April 2002, after

the payments were made. With this information, Reed decided that B.L. Stalnaker was not a creditor when the payments were made because he had no claim, or right to payment, having not yet performed under the agreement. Reed did not list the April 1, 2002 payment to B.L. Stalnaker from Stalnaker. B. L. Stalnaker testified that he received the payments after he performed the surgical assistance in April 2002.

CONCLUSIONS OF LAW

At the close of the trial, Stalnaker moved to dismiss the counts in Ford's complaint relating to 11 U.S.C. §727(a)(3) and (a)(5). The Court granted the motion to dismiss the §727(a)(3) count as to Stalnaker's personal property but not as to Stalnaker Family LLC. The Court also dismissed the §727(a)(5) count as to personal property and Stalnaker Family LLC. The following counts were taken under submission: (1) the §727(a)(3) count relating to Stalnaker Family LLC and Stalnaker & Stalnaker LLC; (2) the §727(a)(4) count regarding the omissions from Stalnaker's schedules and statement of affairs; and (3) the §727(a)(7) count. The Court will not consider the §727(a)(7) because it was not addressed at trial or in the parties' post trial briefs.

I. 11 U.S.C. §727(a)(3) - Failure to maintain financial records

Bankruptcy Code Section 727 states, in pertinent part, that:

> (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;

Section 727(a)(3)'s purpose is to allow the trustee and creditors to correctly determine the property in the debtor's estate and to compile a complete record of the debtor's relevant and material financial and business transactions. To set out a prima facie case under §727(a)(3), a creditor objecting to the discharge must show (1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions. Meridian Bank v. Alten, 958 F.2d 1226, 1233 (3d Cir. 1992) (citing Matter of Decker, 595 F.2d 185, 187 (3d Cir. 1979)). The objecting party has the initial burden of proving the elements of §727(a)(3); if the objecting party makes a *prima facie* case, the burden then shifts to the debtor to explain any lack of records. *In re Sadler*, 282 B.R. 254, 263 (Bankr. M.D. Fla. 2002).

Ford maintains that Stalnaker did not provide sufficient documentation for the transfer of his interests in Astro Imports of Florida and Stalnaker Family, LLC to B.L. Stalnaker in exchange for the Navy Boulevard property in June 2001.[1] According to Ford, the only written record of the transaction is a June 18, 2001 letter from James L. Chase, the attorney who prepared the deed for the transfer of the Navy Boulevard property, to B.L. Stalnaker. Ford also points out that Stalnaker offered no written proof of the transfer of his interest in Stalnaker Family, LLC.

At trial, Stalnaker presented the deed transferring the Navy Boulevard property from B.L. Stalnaker to Stalnaker, and the stock certificates of Astro Imports of Florida signed in blank by

[1]Ford has other issues with the Stalnaker Family-Navy Boulevard transfer that will be discussed later in this opinion.

Stalnaker. The letter dated June 18, 2001 from Chase to B.L. Stalnaker states: "You have instructed me to prepare the necessary paperwork to transfer Todd's stock in Astro Imports of Florida, Inc. to you and to transfer the land on Navy Boulevard to Todd. Additionally, you have requested that we prepare the paperwork to transfer Todd's interest in Stalnaker Family, LLC to you." Chase testified at trial that no other documents were necessary to transfer the property at issue.

The Court must consider whether the records presented as proof of the Navy Boulevard property - Stalnaker Family LLC- Astro Imports transfer created an adequate record from which a trustee can evaluate the financial condition of the debtor. The deed transferring the Navy Boulevard property from Astro Imports of Florida to Stalnaker and the stock certificates of Stalnaker Family LLC signed by Stalnaker on June 18, 2001 indicate that a transfer took place around this time period. Stalnaker's tax returns for 2002 and the following years do not list holdings in Stalnaker Family LLC, indicating that he disposed of the interest some time during 2001. The testimony regarding the transaction shows that it was done in haste. Stalnaker, impatient with the growing debt associated with the car dealerships, wanted out of the business and wanted the Navy Boulevard property in order to recoup some of his losses. There is no evidence that the parties sought legal advice in putting the deal together, and they did not wait to value the property and interests being exchanged. Chase's letter to the Stalnakers cautions: "I strongly advise you and Todd not to proceed with these transfers without time to consider adverse consequences including, but not limited to income taxes, violation of mortgage terms, etc."

Courts have interpreted §727(a)(3) to require a debtor to keep "adequate records" of

financial records, not exact or meticulous business records. "Records need not be kept in any special manner, nor is there any rigid standard of perfection in record-keeping mandated by §727(a)(3)." *Matter of Juzwiak*, 89 F.3d 424, 428 (7th Cir. 1996) citing *Meridian Bank v. Alten,* 958 F.2d 1226, 1230 (3rd Cir. 1992) and others. The documents submitted, while not complete, do provide a trustee with enough information to assess Stalnaker's financial position. A written agreement outlining the terms of the Navy Boulevard- Stalnaker Family, LLC deal would have been preferable, but the warranty deed shows that Stalnaker received the property, and the endorsed stock certificates for Astro Imports of Florida indicate that Stalnaker at least attempted to assign his shares to another party. Stalnaker would not be in possession of any shares of Stalnaker Family, LLC if he transferred them to his father or back to the company. Information about the value of Astro Imports or Stalnaker Family LLC would have to come from each company's books and records, not from documents held by Stalnaker. Accordingly, the Court finds that Ford has not met its burden of proof by showing that the debtor failed to maintain and preserve adequate records, and that this failure makes it impossible to ascertain the debtor's financial condition and material business transactions. The Court therefore will deny the relief Ford requested under 11 U.S.C. §727(a)(3).

II. § 727(a)(4) - False Statements under oath

Section 727(a)(4) provides:

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;
(B) presented or used a false claim;
(C) gave, offered, received, or attempted to obtain money, property, or

> advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
>
> (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;

To prove a claim under §727(a)(4), the objecting party must prove: (1) that debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the statement was made with the intent to deceive; and (5) the statement related materially to the bankruptcy case. *In re Matus*, 303 B.R. 660, 676 (Bankr. N.D. Ga. 2004) (citations omitted). To be "material", the false oath "must bear a relationship to the bankrupt's business transactions or estate, or concern the discovery of assets, business dealings or the existence and disposition of his property." *In re Chalik*, 748 F.2d 616, 618 (11th Cir. 1984). A deliberate omission from bankruptcy schedules or the statement of financial affairs may be considered a false oath under 11 U.S.C. §727(a)(4). *Id.* The objecting party has the initial burden of proof. Federal Rules of Bankruptcy Procedure 4005. The debtor has the ultimate burden to provide a satisfactory explanation of the omission for the court. *Chalik*, 748 F.2d at 619.

Ford alleges that Stalnaker made numerous false oaths by omitting certain transactions from his bankruptcy schedules and statement of affairs, or at the very least, Stalnaker showed a reckless disregard for the truth by the omissions from his schedules and statement of affairs. Stalnaker counters that while he did make a mistake about his ownership interest in Stalnaker and Stalnaker LLC and Stalnaker Family LLC, the other omissions alleged by Ford were not required to be listed in his schedules and statement of affairs. The Court will address each alleged omission below:

A. Stalnaker Family LLC and Stalnaker and Stalnaker LLC

Ford lists the inclusion of Stalnaker Family LLC in Stalnaker's schedule B and the failure to include Stalnaker's interest in Stalnaker and Stalnaker LLC as two separate false statements for purposes of §727(a)(4). The Court will discuss the issues surrounding Stalnaker Family LLC and Stalnaker and Stalnaker LLC together.

Stalnaker maintains that including Stalnaker Family LLC in schedule B and failing to list his interest in Stalnaker and Stalnaker was a simple mistake stemming from the similarity of the names of the two entities. Stalnaker testified at trial that he thought that Stalnaker Family LLC owned the Highway 29 property and some property in Mississippi. He knew that he had transferred his interest in the Highway 29 property in the Stalnaker Family- Navy Boulevard transaction (discussed above) in June 2001. Stalnaker believed that he still had an interest in Stalnaker Family LLC due to the Mississippi property. As a result, he listed a 25% interest in Stalnaker Family LLC on schedule B of his bankruptcy schedules. In reality, the Mississippi property was owned by Stalnaker and Stalnaker LLC, not Stalnaker Family LLC. Because Stalnaker did not realize that Stalnaker and Stalnaker existed and that it owned the Mississippi property, he did not list his interest in the LLC on his bankruptcy schedules.

This explanation is in accord with Stalnaker's testimony at his first meeting of creditors in which he testified that his 25% interest in Stalnaker Family LLC was related to the Mississippi property. It is clear that Stalnaker intended to list his interest in the Mississippi property by listing Stalnaker Family LLC in his schedules. Stalnaker's explanation becomes even more plausible when one considers that Tom Reed, the attorney who prepared Stalnaker's bankruptcy petition and reviewed documents relating to the sale of the Mississippi property by Stalnaker and

Stalnaker LLC, testified at trial that he did not realize that there were two distinct LLC entities. Also at the trial of this matter, counsel for Ford stated that the trial was the first time that he had heard of Stalnaker and Stalnaker LLC. He had reviewed the same documents as Reed, but also failed to distinguish between Stalnaker Family LLC and Stalnaker and Stalnaker LLC. It is apparent that the similarity in the names of the two LLC entities caused confusion for Stalnaker, his attorney and Ford's counsel.

While three of the five elements for denial of discharge under §727(a)(4) have been met, Ford has not proven the two crucial elements remaining. The Court finds no evidence that Stalnaker knew that the statements were false, and no evidence that Stalnaker omitted information or included information with an intent to deceive creditors. As to Ford's theory that the misleading information about Stalnaker Family LLC and Stalnaker and Stalnaker LLC was part of a pattern and practice of omissions and false statements showing reckless disregard for the truth, the Court finds that the confusion between Stalnaker Family LLC and Stalnaker and Stalnaker LLC is not part of a pattern and practice.

B. The $75,000 Settlement with the Bank of Pensacola

Ford finds two false statements related to the Bank of Pensacola settlement. First, Ford alleges that the $75,000 settlement should have been listed as a payment made within one year of filing his bankruptcy petition. Secondly, Ford asserts that Stalnaker should have listed his rights of contribution against Astro Imports, B.L. Stalnaker and Mark Bonifay as an asset in his bankruptcy schedules.

Stalnaker filed his bankruptcy petition in March 2003. The Bank of Pensacola settlement occurred in June 2002. Therefore the transaction did occur within one year of the filing of the

petition. The questions listed in the Statement of affairs request information within certain time limits, including 90 days, one year, two years or six years of the filing of the bankruptcy petition. The two year and six year time limits are not applicable here. Reported cases dealing with denial of discharge under §727(a)(4) typically identify the question in the statement of affairs or the schedule in which the omission occurred. However, Ford's complaint and subsequent pleadings do not specify which question or questions under which the Bank of Pensacola settlement should have been listed. It was left to Stalnaker and the Court to figure out. As Stalnaker points out, the Bank of Pensacola was not a creditor on the date of filing, its debt having been settled in June 2002. Question 3(a) of the Statement of affairs asks the debtor to list all payments, aggregating more that $600, made within 90 days of the bankruptcy petition. The Bank of Pensacola settlement does not fall within this category, and therefore would not have to be listed under question 3(a).

Subsection (b) of question 3 requires the debtor to list payments within one year to or for the benefit of creditors who are insiders. The Bank of Pensacola is not an insider. Ford may have meant that the settlement funds were paid on behalf of B.L. Stalnaker as an insider. However, the release executed by the Bank of Pensacola and Stalnaker refers only to the release of Stalnaker, and makes no mention of B.L. Stalnaker. The Bank's representative, Roger Huffman, testified at trial that B.L. Stalnaker also paid $75,000.00 to settle the Bank of Pensacola's claims against him. Based on this evidence, there is no indication that the Bank of Pensacola settlement should have been listed in Stalnaker's statement of affairs under question 3(b).

In his brief, Stalnaker has asserted that the "other property" referred to in question 10 of the statement of affairs refers to transfers of property other than the payment of money because

questions 3(a) and 3(b) discussed above specifically refer to transfers of income and payments made within the time limits set forth therein. Stalnaker argued that the reference is not to "other transfers", but to "other property" and that it should not refer to payments to creditors that were made over 90 days before the petition was filed. While that argument may be plausible, the real issue is whether the failure to list the settlement payment of $75,000 to the Bank of Pensacola was made "knowingly and fraudulently." The testimony at trial indicated that Stalnaker's attorney knew about the settlement but did not believe it had to be listed in paragraph 10. Ford has not provided evidence other than the omission, nor has it provided any analogous cases with respect to failing to list the settlement under paragraph 10. Therefore, the Court finds that Ford has failed to meet its burden of proof under §727(a)(4) as to this transaction.

Ford also suggests that any right of contribution that Stalnaker may have had against B.L. Stalnaker and Mark Bonifay should have been listed as an asset in his bankruptcy schedules. Ford presented no law indicating that Stalnaker had a right of contribution against the other parties to the lawsuit in the contract action, and the Court will not assume that such a right exists. Further, a right of contribution is an area of the law that is not commonly understood by those not in the legal field. It is difficult to believe that Stalnaker would even have been aware of such a right and then knowingly and fraudulently omitted it from his bankruptcy schedules. He testified that he had no discussions about a right of contribution and was not aware of such a right. The Court finds that Ford has failed to prove that Stalnaker was required to list the Bank of Pensacola settlement in either his Statement of affairs or his bankruptcy schedules. Therefore, the omission is not a false statement under §727(a)(4), and is not part of a pattern and practice of omissions evidencing a reckless disregard for the truth of the facts in his bankruptcy petition.

C. $3,000.00 Payment to B.L. Stalnaker on April 1, 2002

Ford lists Stalnaker's failure to include a $3,000.00 payment on April 1, 2002 to his father, B.L. Stalnaker, in his statement of affairs as a payment to an insider within one year of the filing of his petition[2] as a false statement under §727(a)(4). Stalnaker testified that two $3,000.00 payments were made to his father on March 5, 2002 and April 1, 2002 for surgical assistance during April 2002. At the time of the payments, B.L. Stalnaker had not performed the surgeries for which he was paid. In contrast, B.L. Stalnaker testified that the payments were received after he assisted with the surgeries. Even though B.L. Stalnaker's statement contradicts that of his son, the Court observed the demeanor of the witnesses and concluded that B.L. Stalnaker appeared confused regarding the timing of payment and services performed. No other documentary evidence was introduced to clear up the contradiction. Stalnaker told Reed about the payments to his father. According to Tom Reed's testimony, Reed determined that B.L. Stalnaker was not a creditor when the payments were made because he had no claim, or right to payment, having not yet performed under the agreement. Therefore, the payment did not have to be listed. While a debtor cannot blindly claim to have followed an attorney's advice as to omitting information in his bankruptcy petition, he can assert the defense that he relied on his attorney's advice if "the reliance occurred in fact and [it] was in good faith." *In re Godley*, 164 B.R. 780, 781 (Bankr. S.D. Fla. 1994) quoting *In re Muscatell*, 113 B.R. 72, 74 (Bankr. M.D. Fla. 1990).

Considering all of the circumstances surrounding the failure to list the payment to B.L. Stalnaker in Stalnaker's statement of affairs, the Court finds that Stalnaker did not knowingly and

[2]See Statement of affairs, question 3(b).

fraudulently omit the payment. He informed his attorney of the payment and was advised that the payment was not to a "creditor" as defined under the Bankruptcy Code. Ford offered nothing to refute Reed's position that the payment did not have to be listed. The issue for the Court is whether Stalnaker knowingly and fraudulently failed to list the payment, and the Court finds no evidence of such an intent. Therefore, this transaction cannot be included in a pattern of omissions or inaccuracies from which the Court can infer an intent to defraud.

D. CREDITORS PAID WITHIN 90 DAYS OF FILING OF PETITION

As another example of a pattern and practice of omissions, Ford maintains that Stalnaker's failure to provide an itemized list of creditors paid within 90 days of the bankruptcy filing. As noted above, question 3(a) of the statement of affairs requires a debtor to list all payments aggregating more than $600.00 made within 90 days of filing of the bankruptcy petition. Stalnaker's response was "usual monthly payments." Stalnaker testified that he and his wife paid their bills, including credit card bills, in full each month. Reed testified that he composed the answer to 3(a) based on the Stalnakers' bill paying system. He knew that the debtor did not have much consumer debt and answered the question accordingly. Reed also stated that this response is common for the Northern District of Florida in cases where regular, monthly bills were paid on a current basis.

From the testimony of Stalnaker and Reed, it appears that Stalnaker informed his attorney of the payments made within 90 days of the filing of his petition. Reed made the decision to answer the question according to what he considered to be the local practice of the Northern District of Florida. Reed is an experienced bankruptcy attorney who has also served as a bankruptcy trustee. Ford did not present any testimony or evidence to disprove that the answer is

not the custom and practice in the Northern District. It is difficult to see how Stalnaker could have knowingly and fraudulently omitted these creditors when he gave the information to his attorney who in turn gave a response in keeping with his knowledge of the local custom and practice. Stalnaker also pointed out that although Ford received copies of Stalnaker's bank statements and cancelled checks from January 2000 forward, it presented no evidence of payments for atypical expenses. The Court therefore finds that Stalnaker did not make a false statement regarding creditors who received payment within 90 days of his bankruptcy petition.

E. AMERICAN EXPRESS AS A CREDITOR

Ford asserts that Stalnaker made a false oath by failing to list American Express as an unsecured creditor on schedule F of his bankruptcy petition. Stalnaker listed his credit card accounts with American Express in an intake sheet at Tom Reed's office. However, American Express was not listed as a creditor on schedule F when the bankruptcy petition was filed. Stalnaker testified that he and his wife used the card each month and paid the balance each month in full. Reed testified that he typically did not list as creditors entities with bills that were paid current, even if the bill was a recurring debt. He gave the example of a utility bill that was paid current. Even if the most recent bill was paid, there were probably some outstanding charges.

Stalnaker points out that Ford did not introduce any evidence that Stalnaker had an outstanding balance with American Express on the day that he filed his bankruptcy petition. Ford counters that Stalnaker did not prove that he did not have a balance. Whether or not Stalnaker had a balance on the American Express account is not the key issue. The real issue is whether Stalnaker knowingly and fraudulently omitted American Express as a creditor. He identified American Express as a creditor on the intake sheet at Reed's office. Reed determined

that American Express should not be listed as a creditor in schedule F. Once again, Stalnaker was reasonably and in good faith relying on his attorney's advice to list information in his bankruptcy schedules. "'Where a debtor's actions were motivated by attorney advice, that reliance, if reasonable, may excuse acts which otherwise bear indicia of fraud. However, the attorney must have been made fully aware of all relevant facts-that is, the debtor must have made a full and fair disclosure to him. Reliance on attorney advice absolves one of intent only where that reliance was reasonable and where the advice given was informed advice.'" *In re McLaren*, 236 B.R. 882, 897 (Bankr. D.N.D. 1999) quoting *In re Erdman,* 96 B.R. 978, 985 (Bank. D.N.D. 1988). The Court again finds no evidence that Stalnaker omitted American Express as a creditor from his bankruptcy schedules with an intent to deceive his creditors.

III. TRANSACTIONS NOT CONSIDERED

During a pre-trial conference for this proceeding, the Court directed the parties to confer and file joint stipulations of disputed facts in an effort to narrow the issues for trial and to give Stalnaker an opportunity to fully address the issues raised by Ford. The parties filed a joint statement of disputed issues on April 15, 2004 (Docket entry #59) and an amended and restated joint statement of factual issues not in dispute on April 21, 2004 (Docket entry #61). In its post-trial reply brief, Ford identified several other creditors and transactions that it considered questionable and used them to argue the points in its brief. Because theses creditors and transaction were not identified prior to trial, Stalnaker had no opportunity to explain these transactions. Therefore, the Court will not consider the following transactions that were not listed in the joint stipulation or the amended stipulation in Ford's §727(a)(4) claim: (1) $100,238.01 payment to Stalnaker Mazda on June 7, 2001; (2) a total of $20,001.80 paid to four

attorneys[3]; (3) $3,000.00 payment to B.L. Stalnaker on March 5, 2002;[4] (4) $100,552.78 paid to Whitney Bank on June 7, 2001.

Ford mentioned several other transactions in its post trial briefs, claiming that they were omitted from Stalnaker's statement of affairs. These transactions occurred outside the one year period for transfers under question 3(b) and 10 of the statement of affairs: (1) $100,238.01 payment to Stalnaker Mazda on June 7, 2001; (2) $100,552.78 paid to Whitney Bank on June 7, 2001; (3) transfer of Stalnaker's ownership interest in Astro Imports and Stalnaker Family LLC; and (4) his acquisition of the Navy Boulevard property. Ford asserts that Stalnaker failed to list these transaction that took place within two years of the filing of his petition. However, the only questions in the statement of affairs with a two year look back period are questions 1 and 2 (relating to the debtor's income), question 15 (prior addresses for the debtor), and question 19 (relating to the debtor's books, records and financial statements). The Court finds that Stalnaker was not required to list the transactions enumerated above in his statement of affairs and will not consider them in determining Ford's §727(a)(4) claim.

IV. RECKLESS DISREGARD FOR THE TRUTH

Bankruptcy courts have held that multiple omissions and misstatements in a debtor's bankruptcy petition show a reckless disregard for the truth from which a court can infer fraudulent intent to bar discharge under §727(a)(4). "... [A]ctual intent may be inferred from

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[3]The Court also notes that Stalnaker is not required to list payments to his attorneys, other than Mr. Reed. The payment to Mr. Reed was listed in question 9 of Stalnaker's statement of affairs.

[4]A second $3,000.00 payment to B.L. Stalnaker on April 1, 2002 was listed in the joint stipulation and was discussed above.

circumstantial evidence. The Court may infer fraud from a series of pattern of errors or omissions." *Eastern Diversified Distributors Inc. v. Matus, (In re Matus)*, 303 B.R. 660 (Bankr. N.D. Ga. 2004) (citations omitted). Ford maintains that the numerous omissions in Stalnaker's statement of affairs and bankruptcy schedules outlined above allow this Court to infer that Stalnaker has made false statements which would bar him from receiving his discharge. While acknowledging the law on this point, the Court is unable to infer fraudulent intent in this case because it finds no pattern of omissions or misstatements. Ford has scrutinized Stalnaker's bankruptcy petition and, with the exception of the confusion regarding Stalnaker Family LLC and Stalnaker and Stalnaker LLC, has not been able to prove the type of omissions that warrant the denial of discharge under §727(a)(4).

V. CONCLUSION

"... [Section] 727(a)(4)(A) is not meant to punish debtors for their mistakes or inadvertence. *See Sperling v. Hoflund (In re Hoflund)*, 163 B.R. 879, 882-83 (Bankr. N.D. Fla. 1993). Because of the harshness of the penalty, [footnote omitted] courts generally recognize that '[t]he reasons for denying a discharge . . . must be real and substantial, not merely technical and conjectural.'" *Crews v. Stevens (In re Stevens)*, 250 B.R. 750, 754 (Bankr. M.D. Fla. 2000) (citations omitted). Although Ford proved that Stalnaker made a mistake in his schedules by listing Stalnaker Family LLC, it failed to prove that the listing was done with an intent to deceive. The remaining catalog of omissions alleged by Ford turned out not to be omissions at all, but information that the bankruptcy attorney determined did not need to be listed or that was not required by the statement of affairs or bankruptcy schedules. For the reasons listed above,

the Court finds that the relief sought by Ford under 11 U.S.C. § 727(a)(3) and (a)(4) should be denied. It is hereby

ORDERED that the relief sought in Ford's complaint pursuant to 11 U.S.C. § 727(a)(3) and (a)(4) is **DENIED**.

Dated: October 15, 2004

William S. Shulman

WILLIAM S. SHULMAN
CHIEF U.S. BANKRUPTCY JUDGE