DOCKET NUMBER: 99-12592
ADV. NUMBER: 99-1319
JUDGE: M. A. Mahoney
PARTIES: Robert Hammond Wilkins, Theodore L. Hall, Autoutlet, Inc.
CHAPTER: 7
ATTORNEYS: B. A. Friedman, T. L. Hall
DATE: 4/27/01
KEY WORDS:
PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

ROBERT HAMMOND WILKINS, et al., Case No. 99-12592-MAM

Debtor.

THEODORE L. HALL, Trustee,

Plaintiff, Adv. No. 99-1319

v.

ROBERT HAMMOND WILKINS, et al.

Defendant.

ORDER OVERRULING OBJECTION TO DISCHARGE

Barry A. Friedman, Mobile, Alabama, Attorney for Debtor
Theodore L. Hall, Mobile, Alabama, Trustee

This matter is before the Court on the complaint of Theodore L. Hall, Trustee, to object to the discharge of the debtor. 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 is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is overruling the objection of the trustee to the discharge of the debtor.

FACTS

Robert Wilkins owns 80% of Autoutlet Inc. On March 4, 1997, Wilkins entered into an agreement, both individually and doing business as Autoutlet, with John Lewis. Under the agreement, Wilkins and Autoutlet loaned $25,000 to Lewis and Lewis was to repay the loan in

installments. The loan was never paid in full. In 1998, an attorney hired by Wilkins filed a lawsuit against Lewis for the indebtedness and obtained a default judgment in the amount of $8,300 plus costs. Wilkins claims he did not know of the judgment and did not even realize that a lawsuit had been filed. He had referred it to an attorney but was never updated on the matter. He did not know there was a judgment in his favor against Lewis until after the bankruptcy filing. Wilkins further testified that he had been unable to locate Lewis and thought it was unlikely the judgment could be collected. He stated that he had a lot going on during that time. Wilkins went through a divorce, had many suits against him, and Autoutlet, Inc., of which he was the majority owner, was having financial difficulty.

On July 28, 1999, Wilkins filed for relief pursuant to chapter 7 of the Bankruptcy Code. On that same date Autoutlet Inc. also filed for relief pursuant to chapter 7 of the Bankruptcy Code. Wilkins did not list the lawsuit or judgment as an asset in his schedules. Wilkins also did not list the suit or judgment in his statement of financial affairs, although he listed eleven other suits filed against Wilkins. The trustee, Theodore Hall, did not become aware of the suit until late in 1999 during a creditor's meeting, from someone other than the debtor.

Wilkins also omitted several other things from his schedules and statement of financial affairs. He did not list the transfer of a boathouse that was sold seven months before filing bankruptcy. Wilkins also failed to list several assets including a $1,000 promissory note, four checks that total $485. 33 and several airline tickets which may be redeemable.

The original complaint was filed on December 22, 1999. The original complaint objected to debtor's discharge only on the basis that the disposition of the proceeds from the sale of a boathouse by Wilkins had not been satisfactorily explained. Wilkins has since then explained the disposition of those assets and amended his schedules and statement of financial affairs to

include the transfer. On February, 22, 2000, Wilkins gave Hall documentation of the agreement between Wilkins and Lewis, as well as other documents concerning possible assets of Wilkins and/or Autoutlet, Inc. including the items mentioned above that he failed to include in his schedules. The complaint was later amended and was served on Wilkins on March 10, 2000. The amended complaint contains three counts. The trustee concedes that he is only proceeding under count III of the complaint and asks this Court to deny a discharge to debtor pursuant to 11 U.S.C. §§ 727(a)(2)(B) and 727(a)(4)(A) on the basis that debtor knowingly and fraudulently concealed the suit and judgment against Lewis and made a false oath or account by not listing the asset in his schedules.

LAW

A. Section 727(a)(2)(B)

The party objecting to a discharge has the initial burden of proving the objection by a preponderance of the evidence. Bankruptcy Rule 4005 (1987); *Grogan v. Garner*, 498 U.S. 279, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991). However, once the plaintiff has met the initial burden by producing evidence which establishes a basis for the objection, the defendant has the ultimate burden of persuasion. *See, Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 619 (11th Cir. 1984). Section 727 is to be construed liberally in favor of the debtor because denial of a discharge is an extreme penalty. *Rosen v. Bezner*, 996 F.2d 1527, 1532 (3d Cir. 1993).

Section 727(a)(2)(B) states that the court shall grant a discharge, unless:

> 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 . . . concealed, or has permitted to be . . . concealed --
>
> (B) property of the estate, after the date of the filing of the petition;

Before the Court should deny a debtor a discharge on the basis of intent to defraud, the evidence must show that the debtor had an actual intent to defraud. *Pavy v. Chastant (In re Chastant)*, 873

F.2d 89, 91 (5th Cir. 1989). Actual intent may be established by circumstantial evidence or by inferences drawn from a course of conduct. *In re Sullivan*, 204 B.R. 919 (Bankr. N.D. Tex. 1997).

On February, 22, 2000, prior to being served with the amended complaint which contained the allegations concerning the suit against Lewis, Wilkins gave the trustee documentation of the agreement between Wilkins and Lewis. Wilkins testified that he was not aware that the suit had been filed, much less that a judgment had been obtained. In addition, Wilkins testified that he thought it was unlikely the judgment could be collected. The asset may be worthless. Omitting worthless assets of a debtor from his bankruptcy schedules is sufficient for the denial of a discharge under § 727(a). *Scimeca v. Umanoff*, 169 B.R. 536, 543 (D.N.J. 1993), *aff'd,* 30 F.3d 1488 (3d Cir. 1994); *In re Calder*, 907 F.2d 953, 955 (10th Cir. 1990). Creditors are entitled to judge for themselves what will benefit, and what will prejudice them. *Morris Plan Industrial Bank v. Finn*, 149 F.2d 591, 592 (2d Cir. 1945). The debtor should not make that decision for the trustee and creditors by not listing some assets. However, although the value of the omission does not control the operation of the statute, value may be considered in ascertaining the intent of the debtor. *In re Pond*, 221 B.R. 29 (Bankr. M.D. Fla. 1998). "Where the assets omitted from the bankruptcy schedules are of little or no value, fraudulent attempts to conceal assets will not be imputed." *Chevy Chase Fed. Sav. Bank v. Graham (In re Graham)*, 122 B.R. 447, 452 (Bankr. M.D. Fla. 1990). This Court finds that based on the debtor's testimony and the fact that the debtor provided the Trustee with documentation concerning the asset prior to being served with the amended complaint, debtor does not have the requisite intent to be denied a discharge under § 727(a)(2)(B).

B. Section 727(a)(4)(A)

There is some overlap between the provisions for denial of discharge at subsections (2) and (4) of § 727(a). *In re Mathern,* 137 B.R. 311, 326 (Bankr. D. Minn.), *aff'd*, 141 B.R. 667 (D. Minn. 1992). Section 727(a)(4)(A) provides that a discharge shall be granted unless: "the debtor knowingly and fraudulently, in or in connection with the case--made a false oath or account." To deny the discharge pursuant to § 727(a)(4)(A), a court must find that a debtor knowingly made a false oath that was both material and fraudulent. *See Swicegood v. Ginn*, 924 F.2d 230, 232 (11th Cir. 1991).

The Debtor submitted his bankruptcy statements and schedules on the prescribed forms, which required him to verify the averments in them under penalty of perjury. By statute, that has the force and effect of an oath. 28 U.S.C. § 1746. *See also Dickinson v. Wainwright*, 626 F.2d 1184, 1186 (5th Cir. 1980) (subscription to false statement made under 28 U.S.C. § 1746 equates to false oath). It is well established that a deliberate omission may constitute a false oath, and thus result in a denial of the discharge. *See Raiford v. Abney (In re Raiford)*, 695 F.2d 521, 522 (11th Cir. 1983); *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 618 (11th Cir. 1984). The veracity of a debtor's petition, including schedules and statements, is essential to the successful administration of the Bankruptcy Code. *See Cepelak v. Sears (In re Sears)*, 246 B.R. 341, 347 (8th Cir. B.A.P. 2000).

To merit denial of discharge, a debtor's misrepresentation or omission must be material. *In re Olson*, 916 F.2d 481, 484 (8th Cir. 1990). The threshold to materiality is fairly low: "The subject matter of a false oath is 'material,' and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transactions or estate, or concerns 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) (per curiam). The asset in this case clearly bears a relationship to the

debtor's estate and the existence or discovery of assets. As discussed above, the fact that the asset may be worthless is not controlling.

However, as discussed above, value may be considered in ascertaining the intent of the debtor. If debtor did not make the false oath "knowingly and fraudulently," then a discharge will not be denied. Although Wilkins hired an attorney to pursue the debt, this Court finds Wilkins' testimony that he was not aware a suit had been filed or that a default judgment had been obtained to be believable. Wilkins had a lot going on during that time. He was going through a divorce and was dealing with a failing company and many suits filed against the company and himself. Wilkins thought Lewis could not be found and believed the debt was uncollectible. Wilkins still should have listed the asset on his schedules, whether reduced to judgment and collectible or not, but this Court finds the omission was not intentional.

Some courts have held that when a debtor omits numerous items from his schedules and statement of affairs a discharge may be denied on the basis that it demonstrates a "reckless disregard for the truth." *In re Dupree*, 197 B.R. 928, 938 (Bankr. N.D. Ala. 1996)*; Riggs v. Cross (In re Cross)*, 156 B.R. 884 (Bankr. D.R.I. 1993); *Youngblood v. Hembree (In re Hembree)*, 186 B.R. 530, 532 (Bankr. M.D. Fla. 1995). The standard is applied when a pattern of conduct evinces an "obvious pattern of deceit which flies in the face of the true purpose of the Bankruptcy Code." *In re Casado*, 187 B.R. 446, 450 (Bankr. E.D.N.Y. 1995). However, debtor pointed out most of the omissions to the trustee presumably before trustee was even aware they existed. There is no evidence that Wilkins was vague or evasive when asked about an asset or transaction. Debtor's actions were not in reckless disregard of the truth. The only omission Wilkins did not bring to the attention of the trustee prior to any action being taken was his explanation of the disposition of proceeds from the sale of his boathouse. Wilkins has now

amended his schedules and his statement of financial affairs to include the transfer of the boathouse and has satisfactorily explained the disposition of the proceeds. While later disclosure will not cure a false oath, this Court finds that Wilkin's omissions do not rise to the level of fraud. Based on Wilkins' testimony and the fact that he provided documentation concerning the assets prior to being served with the amended complaint, this Court finds that debtor did not "knowingly and fraudulently" make a false oath.

THEREFORE, IT IS ORDERED AND ADJUDGED: the objection of the trustee, Theodore L. Hall, to the discharge of debtor pursuant to §§ 727(a)(2)(B) and 727(a)(4)(A) is OVERRULED.

Dated: April 27, 2001

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE