United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Daniel P. Maida and Rebecca D. Maida

Bankruptcy No. 98 B 40900

Adversary Caption: Richard H. Divelbiss v. Daniel P. Maida and Rebecca D. Maida

Adversary No. 99 A 00427

Date of Issuance: July 25, 2000

Judge: John H. Squires

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: DANIEL P. MAIDA and REBECCA D. MAIDA, Debtors.	)	Chapter 7 Bankruptcy No. 98 B 40900 Judge John H. Squires
RICHARD H. DIVELBISS, Plaintiff, v.	)	Adversary No. 99 A 00427
DANIEL P. MAIDA and REBECCA D. MAIDA, Defendants.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion for reconsideration filed by Daniel and Rebecca Maida (the "Debtors"). For the reasons set forth herein, the Court hereby denies the motion.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(J).

II. FACTS AND BACKGROUND

Most of the relevant facts and background of this adversary proceeding are contained in an earlier Opinion of the Court. See Divelbiss v. Maida (In re Maida), Ch. 7 Case No. 98 B 40900, Adv. No. 99 A 00427, 2000 WL 777875 (Bankr. N.D. Ill. June 15, 2000). The Debtors' discharge was denied and the objection thereto filed by Richard Divelbiss (the "Creditor") under 11 U.S.C. § 727(a)(4)(A) was sustained. His objections under 11 U.S.C. § 727(a)(2)(A) and 11 U.S.C. § 727(a)(5) were overruled. The Court found that the Debtors failed to schedule and list ownership of a computer and failed to disclose transfers of money to insider relatives in the answers to the applicable questions on their Statement of Affairs. See 2000 WL 777875 at *5-7.

In their motion for reconsideration, the Debtors argue that they did not own a computer at the time of the bankruptcy filing. They contend that they disposed of it one month prior to the filing date for no value. They argue that Mr. Maida had testified that he had purchased software for use on his computer at work. They also argue that the undisclosed funds they transferred to Mrs. Maida's brother and sister occurred contemporaneously or simultaneously with the loans given to the Debtors, so that neither relative was a creditor, and therefore not required to be disclosed.

III. APPLICABLE STANDARDS

The Seventh Circuit Court of Appeals has instructed courts to treat all substantive post-judgment motions, regardless of their captions, if filed within ten days of judgment, under Federal Rule of Civil Procedure 59. United States v. Deutsch, 981 F.2d 299, 301 (7th

Cir. 1992); Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 957 F.2d 515, 517 (7th Cir.), cert. denied, 506 U.S. 829 (1992); Charles v. Daley, 799 F.2d 343, 347 (7th Cir. 1986). Motions made thereafter are considered under the provisions of Rule 60 of the Federal Rules of Civil Procedure, as adopted by Federal Rule of Bankruptcy Procedure 9024. Because the motion to reconsider was filed on June 29, 2000, more than ten days after the Court's Memorandum Opinion and Order were entered on the docket on June 15, 2000, the authorities and standards under Rules 60 and 9024 are applicable and controlling. Rule 60 governs relief from a final judgment. Britton v. Swift Transp. Co., 127 F.3d 616 (7th Cir. 1997).

Federal Rule 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken....

Fed. R. Civ. P. 60(b).

Rule 60(b) contains five clauses, (b)(1) - (b)(5), delineating specific grounds for obtaining relief. Wesco Prods. Co. v. Alloy Automotive Co., 880 F.2d 981, 983 (7th Cir.

1989). Additionally, Rule 60(b) contains a catchall clause in Rule 60(b)(6). Id. The first five clauses and the catchall clause are mutually exclusive. Webb v. James, 147 F.3d 617, 622 (7th Cir. 1998). "Thus, if the asserted grounds for relief fall within the terms of the first [five] clauses of Rule 60(b), relief under the catchall provision is not available." Brandon v. Chicago Bd. of Educ., 143 F.3d 293, 295 (7th Cir. 1998) (quoting Wesco, 880 F.2d at 983). The Debtors do not state under which clause of Rule 60(b) they seek relief. Based upon the allegations in the motion, the Court will proceed under Rule 60(b)(1).

Relief from a judgment under Rule 60(b)(1) for mistake, inadvertence, surprise or excusable neglect is an extraordinary remedy and is granted only in exceptional circumstances. C.K.S. Engineers, Inc. v. White Mountain Gypsum Co., 726 F.2d 1202, 1205 (7th Cir. 1984). The burden of establishing proper grounds for Rule 60 relief rests upon the movant. National Bank of Joliet v. W. H. Barber Oil Co., 69 F.R.D. 107, 109 (N.D. Ill. 1975). A motion under Rule 60(b) is addressed to the sound discretion of the trial judge. Pretzel & Stouffer, Chartered v. Imperial Adjusters, Inc., 28 F.3d 42, 45 (7th Cir. 1994).

IV. DISCUSSION

In In re Yonikus, 974 F.2d 901 (7th Cir. 1992), the Seventh Circuit held that a debtor's failure to list a pre-petition personal injury and worker's compensation claim on his schedules constituted grounds for revocation of the debtor's discharge (the Yonikus trustee sought to revoke debtor's discharge under 11 U.S.C. § 727(d)(2), the post-discharge equivalent to § 727(a)(4)(A)). In rejecting the debtor's argument that the worker's compensation award was exempt and the personal injury claim was property of his employer

and not him, the court stated, "[d]ebtors have an absolute duty to report whatever interests they hold in property, even if they believe their assets are worthless or are unavailable to the bankruptcy estate." Id. at 904 (citations omitted).

Applying this principle to the Debtors' failure to disclose assets reaches the same result whether the undisclosed asset is either tangible computer hardware, like a home-based PC, Apple desktop or portable unit, which the Court understood was still extant upon the date of filing, or intangible computer software like that which Mr. Maida bought and was using pre-petition on the computer he used at work, as the Debtors' argue in the motion at bar. The important point is that the software purchased by Mr. Maida, and used when the petition was filed, was never scheduled by the Debtors on their original or amended Schedule B or any other paper they filed disclosing their assets. Apparently, the Debtors failed to disclose the disposition of the alleged worthless computer about a month prior to filing.

The Court also rejects the contention that the pre-petition transfers and repayments of several thousands of dollars to Mrs. Maida's siblings did not have to be disclosed in the answer to the pertinent question on the Statement of Affairs because the repayments by the Debtors were substantially close in time to the advances made by the relatives. While substantially contemporaneous exchanges between debtors and their creditors may be defensible to a preferential avoidance action under 11 U.S.C. § 547(c)(1)(A), that section is inapplicable as a defense to an objection to discharge under § 727(a)(4), when the charge is that the Debtors made a false statement under oath by omitting to disclose transfers to insiders within the applicable one year period pre-petition. Moreover, the Debtors have not cited to any supporting authority for this argument. Consequently, this results in the

forfeiture of the point. See LINC Finance Corp. v. Onwuteaka, 129 F.3d 917, 921 (7th Cir. 1997); Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1023 (7th Cir. 1990). The Court does not have a duty to research and construct legal arguments available to a party. Head Start Family Educ. Program, Inc. v. Cooperative Educ. Serv. Agency 11, 46 F.3d 629, 635 (7th Cir. 1995).

The non-disclosure by the Debtors of what may or may not be defensible preferential payments to the insider relatives was the violation of § 727(a)(4). It is precisely because insider transfers need to be scrutinized carefully by bankruptcy trustees who may opt to attempt to avoid and recover same that disclosure is required on the Statement of Affairs. Non-disclosure and the resultant concealment effectively frustrates the proper administration of the bankruptcy estate, and will not be tolerated.

V. CONCLUSION

For the foregoing reasons, the Court denies the Debtors' motion for reconsideration.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

_____

John H. Squires
United States Bankruptcy Judge

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