United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re David Michael Goeldner

Adversary Caption: Waukegan Auto Center, Inc. v. David Michael Goeldner

Bankruptcy No. 02 B 32521

Adversary No. 01 A 1999

Date of Issuance: March 26, 2004

Judge: A. Benjamin Goldgar

Appearance of Counsel:

Attorney for Debtor: Kenneth S. Borcia, Libertyville, IL

Attorney for Waukegan Auto Center, Inc.: Patterson Carl Meuth, Waukegan, IL

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 7
	)	
DAVID MICHAEL GOELDNER,	)	No. 02 B 32521
	)	
Debtor.	)	Judge Goldgar
	)	
	)	
WAUKEGAN AUTO CENTER, INC.,	)	
	)	
Plaintiff,	)	
v.	)	No. 02 A 01999
	)	
DAVID MICHAEL GOELDNER,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before court on the motion of debtor David Michael Goeldner for summary judgment on the complaint of Waukegan Auto Center, Inc.

1. Background

In its complaint, Waukegan asks the court to deny Goeldner a discharge because of omissions and false statements in Goeldner's bankruptcy schedules and statement of financial affairs. Although Waukegan does not specify the Code provision on which it relies, the complaint's allegations appear to fall under section 727(a)(4)(A). That section denies a discharge to a debtor who "knowingly and fraudulently, in or in connection with the case made a false oath or account." 11 U.S.C. § 727(a)(4)(A).

Waukegan appears to allege two false oaths or statements. The first is actually a series of statements made in Goeldner's Schedule I concerning his income at the time of filing and for the preceding two years. According to Waukegan, Goeldner stated in Schedule I that his income in 2000 was $0, his income in 2001 was $5000, and his income in 2002, the year he filed his petition, was $151 per week. These statements, Waukegan says, were knowingly false and fraudulent.

The second false oath consists of Goeldner's omission of a debt he owed to one Frances Sprecher, the woman with whom he lives. According to Waukegan, Goeldner did not disclose in his schedules and statement of financial affairs that he turns his paychecks over to Sprecher and that she gives him an allotment for expenses. Goeldner apparently owed Sprecher $22,345 at the time of his bankruptcy filing, but he did not include Sprecher in the list of unsecured creditors in Schedule F. And although Goeldner allegedly paid Sprecher more than $600 in the ninety days preceding his bankruptcy, he did not disclose those transfers in his statement of financial affairs. Like the misstatements, the omissions are alleged to have been knowing and fraudulent.

Goeldner has moved for summary judgment on Waukegan's complaint, supported with his own affidavit, Sprecher's affidavit and accompanying exhibits. In his affidavit, Goeldner describes his income for the years 2000-2002, which he notes was intermittent. He also attests that he was voluntarily paying Sprecher back the amounts he owed her and so did not realize that he should have named her as a creditor in his schedules. After the meeting of creditors, but before Waukegan filed its adversary complaint, Goeldner

amended Schedule F to include the $22,345 debt to Sprecher.

In response, Waukegan submits a memorandum accompanied by the affidavit of its counsel. Counsel asserts in his affidavit simply that at the creditors meeting Goeldner was asked about a "loan" to Sprecher and why he "did not mention the loan earlier," to which Goeldner replied that Sprecher "had told him he should not list it in the bankruptcy."

Waukegan's response was not timely filed, and no extension of time to file it was ever requested. At the last status hearing, the court told counsel that the response would not be considered because it was filed late. The court has decided to consider the response because it does not alter the outcome here.

2. Discussion

Goeldner's motion for summary judgment will be granted. The standard under Rule 56 is, of course, familiar. Summary judgment is appropriate if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) (made applicable in Fed. R. Bankr. P. 7056); *Estate of Allen v. City of Rockford,* 349 F.3d 1015, 1019 (7th Cir. 2003). On a motion for summary judgment, "the court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Payne v. Pauley,* 337 F.3d 767, 770 (7th Cir. 2003) (internal quotation omitted).

Where a debtor intentionally misstates or omits material information to mislead creditors and the trustee about his financial condition, the misstatements or omissions

constitute a false oath, and the debtor may be denied a discharge under section 727(a)(4)(A). *See Cole Taylor Bank v. Yonkers (In re Yonkers)*, 219 B.R. 227, 233 (Bankr. N.D. Ill. 1997); *Bensenville Community Credit Union v. Bailey (In re Bailey)*, 147 B.R. 157, 162-63 (Bankr. N.D. Ill. 1992). The party objecting to discharge under that section must prove what for purposes of this case are two elements: (1) material misstatements or omissions (2) made with an improper intent, that is knowingly and fraudulently. *Cf. Yonkers,* 219 B.R. at 232 (breaking down section 727(a)(4)(A) into five elements).

Goeldner is plainly entitled to summary judgment on the claim concerning alleged misstatements of his income. Goeldner attests that his income was indeed $0 in 2000 and $151 per week in 2002, just as his Schedule I said. Waukegan has no evidence to the contrary. Therefore, Goeldner made no misstatements for those years, let alone made them knowingly or fraudulently. For 2001, on the other hand, Goeldner now says his income was $1,281.51 when his Schedule I said it was $5,000. That is a misstatement. But Waukegan offers no evidence that the misstatement was knowing or fraudulent – indeed, Waukegan does not address the income issue in its response at all – and it is hard to see how a debtor's *overstatement* of his income could be "material" in any event.

Goeldner is equally entitled to summary judgment on the claim concerning Sprecher. Goeldner does not deny that at the outset of his bankruptcy case, he omitted the debt to Sprecher from his schedules and statement of financial affairs. Nor does he deny that the omission was material. Instead, Goeldner argues that Waukegan has no evidence that he made the omission intending to defraud anyone.

The court agrees. The only evidence before the court consists of Goeldner's uncontested assertion that he neglected to list the debt to Sprecher because he thought he did not have to, and he thought so because he intended to pay Sprecher back. Once he learned at the creditors meeting that he had to list the debt, he amended his Schedule F to list it – doing so before Waukegan filed its adversary. All Waukegan has to offer on the subject is Goeldner's statement at the creditors meeting that he did not list the debt because Sprecher told him not to. That statement, however, is entirely consistent with Goeldner's explanation of what happened. It raises no issue of fact.

On summary judgment, the non-movant must adduce evidence raising an issue of fact on every essential element of the case on which it bears the burden of proof. If that showing is not made, the motion must be granted. *Indiana Funeral Directors Ins. Trust v. Trustmark Ins. Corp.*, 347 F.3d 652, 654 (7th Cir. 2003); *Ross v. Town of Austin*, 343 F.3d 915, 917 (7th Cir. 2003). This is true even when the element is intent. Although intent is typically considered a question of fact, summary judgment on the issue is proper when the non-movant utterly fails to supply evidence sufficient to warrant a trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) (noting that summary judgment in libel case is warranted "if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice"); 10B C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 2730 at 5-6, 20, 40-43 (1998).

That is precisely what has happened here. Goeldner has submitted evidence of his own honest intentions, including his post-creditors meeting amendment of his schedules

unprompted by Waukegan's effort to deny him a discharge. *Cf. Bailey*, 147 B.R. at 165 (corrective action, while not conclusive or sufficient in itself to expunge a false oath, is evidence of innocent intent). Waukegan has offered nothing to the contrary – certainly nothing justifying a trial.

There is no genuine issue of fact for trial here, then, and the evidence shows only an honest omission. Honest omissions in a debtor's schedules are not grounds for denial of discharge. *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1295 (10th Cir. 1997). Goeldner is entitled to summary judgment on the omission claim, as well.

3. Conclusion

The motion of debtor David Michael Goeldner for summary judgment on the complaint of Waukegan Auto Center is granted. A separate Rule 9021 judgment will be entered in accordance with this opinion.

Dated: March 26, 2004

ENTER: _____
United States Bankruptcy Judge