United States Bankruptcy Court
Northern District of Illinois
Eastern Division

<u>Transmittal Sheet for Opinions</u>

Will this opinion be published? No

Bankruptcy Caption: Leonard Chavin

Bankruptcy No. 94 B 25586

Adversary Caption: <u>In re Gus A. Paloian, not individually but solely as the Trustee of the Bankruptcy Estate of Leonard Chavin v. Leonard Chavin</u>

Adversary No. 95 A 01162

Date of Issuance: August 18, 1996

Judge: Susan Pierson Sonderby

Appearance of Counsel:

Attorney for Movant or Plaintiff: Gus A. Paloian

Attorney for Respondent or Defendant: Thomas Arnett

Trustee or Other Attorneys:

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	
	)	
LEONARD CHAVIN,	)	Case No. 94 B 25586
	)	
Debtor.	)	
______________________________	)	
	)	
GUS A. PALOIAN, not individually but solely as the Trustee of the Bankruptcy Estate of Leonard Chavin,	)	Adversary No. 95 A 01162
	)	
Plaintiff,	)	
	)	
v.	)	Honorable Susan Pierson Sonderby
	)	
LEONARD CHAVIN,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the cross motions of Gus A. Paloian, not individually but solely as the Trustee of the Bankruptcy Estate of Leonard Chavin ("Trustee" or "Plaintiff") and of Leonard Chavin ("Debtor" or "Defendant") for summary judgment on the adversary complaint. The relief requested pursuant to the complaint is for denial of Debtor's discharge on four counts. Count I is brought under 11 U.S.C. § 727(a)(4) for denial of discharge based on intentional false oaths. Count II is brought pursuant to § 727(a)(2), under which the Debtor's discharge may be denied for transferring or concealing property within one year of filing for protection under the Bankruptcy Code. The Trustee brought Count III under § 727(a)(3), requesting denial of discharge as a result of the failure to produce records. Finally, Count IV

calls for a denial of discharge under § 727(a)(5) due to the Debtor's failure to adequately explain a loss of assets.

Based on the papers filed, affidavits, and undisputed facts, this Court denies Defendant’s motion, grants the Trustee’s motion as to Counts I and II and denies the Trustee’s motion as to Counts III and IV.

DEBTOR’S MOTION FOR SUMMARY JUDGMENT

The Defendant filed a motion for summary judgment on April 18, 1996. The Court denies this motion for several reasons. First, the Defendant does not describe the counts for which he is requesting summary judgment; instead, his prayer for relief asks “the Court to dismiss me from Bankruptcy.” Dismissal of a bankruptcy case is not permissible relief on a motion for summary judgment in an adversary proceeding. Second, the Defendant does not provide any cogent or logical argument to the Court. Instead, the motion consists of six numbered paragraphs, most of which attack the Trustee, e.g., “[t]he Trustee has conducted himself in a manner to confiscate monies due my Creditors, Blackmail, intimidate and Civilly discriminate against my Business Associates, my friends and my family.”

Finally, the Defendant did not comply with the requirements of Local Rule 402(M). The Rule requires that a party who has moved for summary judgment

> shall serve and file--
> . . . .
> (3) a statement of material facts as to which the moving party contends there is no genuine issue and that entitles the moving party to judgment as a matter of law that includes:
> (a) a description of the parties; and
> (b) all facts supporting venue and jurisdiction in this Court.
> . . . .
> Failure to submit such a statement constitutes grounds for denial of the motion.

The Court extends a measure of leniency to pro se litigants, and Defendant’s notice indicates that he intended this to be a pro se motion. However, the Court was subsequently made aware of the fact that

Defendant was receiving assistance from an attorney. As a result, the Court entered the following order on May 22, 1996:

> Thomas Arnett shall be deemed as the attorney of record for Defendant solely for purposes of the Trustee's motion for Summary Judgment and the Debtor's motion for Summary Judgment and the debtor shall not be entitled to any of the benefits accorded pro se litigants in connection with resolution of the cross motions for summary judgment.

Based on his lack of cogent argument and failure to comply with Rule 402(M), the Court denies Defendant's motion for summary judgment.

TRUSTEE'S MOTION FOR SUMMARY JUDGMENT

Procedural Background

The Trustee filed a Rule 402(M) Statement to accompany his motion for summary judgment ("402(M)"). The Rules require the respondent to file a Rule 402(N) Statement. Pursuant to Local Rule 402(N),

> Each party opposing a motion under Fed. R. Civ. P. 56 (Fed. R. Bankr. P. 7056) shall serve and file the following:
>
> . . . .
>
> (3) a concise response to the movant's statement of facts that shall contain:
>
> (a) a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon; and
>
> (b) a statement, consisting of short numbered paragraphs, of any additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon. All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party.

The Debtor filed "Pro Se Objections to the Trustee's Rule 402(M) Statement of Material Facts About Which He Claims There is No Genuine Issue of Fact" ("Objections"). The Debtor did not repeat each

allegation of fact and declare whether he admitted or denied it or needed to provide further elaboration. Instead, he explained certain paragraphs and ignored others, and provided no references to affidavits or other appropriate evidence. As noted above, for purposes of these motions the Court will not extend to the Debtor the leniency afforded a pro se litigant. Facts to which no proper response is given are deemed admitted. Marriott Family Restaurants v. Lunan Family Restaurants (In re Lunan Family Restaurants), 194 B.R. 429, 440 (Bankr. N.D. Ill. 1996) ("Failure to comply with requirements of Rule 402 may result in the opponent's fact statement being deemed admitted.").

> Compliance with the Local Rules is not a mere technicality. The Court relies greatly upon the information presented in these statements in separating the facts about which there is a genuine dispute from those about which there is none. American Ins. Co. v. Meyer Steel Drum, Inc., 1990 WL 92882 at *7 (N.D. Ill. June 27, 1990). This Court 'should not be required to guess whether the facts asserted by the opposing part[y] are in direct conflict or scour the record in search of a party's evidence.' Fotsch v. Eli Lilly and Co., 1995 WL 238677 at *1, n.1 (N.D. Ill. Apr. 20, 1995). Moreover, Fed. R. Civ. P. 56 (Fed. R. Bankr. P. 7056) and Local Rule 402 contemplate statements of material fact. Statements that embody conclusions will not be treated as undisputed facts. See Maksym v. Loesch, 937 F.2d 1237, 1243 (7th Cir. 1991); Davis v. City of Chicago, 841 F.2d 186, 189 (7th Cir. 1988).

In re Szombathy, 1996 WL 417121, *3 (Bankr. N.D. Ill. 1996).

FACTUAL BACKGROUND

An involuntary petition was filed under Chapter 7 of the Bankruptcy Code against the Debtor on December 30, 1994. The Debtor consented to the entry of an order for relief against him on or about February 2, 1995. Debtor filed his bankruptcy schedules and statement of financial affairs on or about March 16, 1995 ("Pl. Ex. 2").[1] Paloian was appointed to serve as trustee.

Maxwell Street Associates and the Halsted Property

In 1987, the Debtor and David Husman ("Husman") entered into a partnership known as Maxwell Street Associates (the "Partnership"). Pl. Ex. 7. The Partnership owned the commercial real property at 1214-1216 South Halsted and 1250-1260 South Halsted (the "Halsted Property"). Pursuant to the partnership agreement, the Debtor was "responsible for renting and managing all of the stores contained in the 'PROPERTY,' for which he is to receive no remuneration, [sic] whatsoever, other than the benefits he shall derive under the terms and conditions of this Contract." Pl. Ex. 7. The partnership agreement also provided that the Debtor would receive a monthly distribution of $1,400 from the Halsted Property's cash flow, if any cash flow remained after making a payment to Husman. Pl. Ex. 7.

The Defendant did not disclose his interest in the Halsted Property or in Maxwell Street Associates on his bankruptcy schedules. Pl. Ex. 2. The Debtor alleges that there is a material dispute as to whether he had an interest in this property on the petition date because he was in default on his obligations under the partnership agreement. Objections ¶ 8. Husman testified, however, that the Debtor continued to make mortgage payments on the Halsted Property until July 1995. Husman Deposition, January 26, 1996 ("Husman Tr.") at 12. He further testified that he gave notice to Chavin around November 1995, nine

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Plaintiff attached 47 exhibits to his motion for summary judgment. When referring to these exhibits, the Court will use the abbreviation "Pl. Ex. ___."

months after the Debtor signed his bankruptcy schedules, that the partnership had terminated. Husman Tr. at 13.

Debtor has cited no evidence in the record to support his statement that the partnership had terminated and that he had no interest in the Halsted Property or in Maxwell Street Associates. Furthermore, he has not alleged any facts to rebut Husman's testimony. Since Debtor has failed to support his statement with evidence, the Plaintiff's statement that Maxwell Street Associates existed and was active as of the petition date is deemed admitted. 402(M) ¶ 8.

Furthermore, Debtor failed to disclose in his bankruptcy schedules that he had received at least $17,000 during 1994 from the Halsted Property. Pl. Ex. 2. Debtor admits that he failed to list this income, although he denies that the omission was intentionally made. Objections ¶ 40; Chavin Deposition, March 14, 1996 ("Chavin Tr. III") at 24.

Loans to Other Entities

From 1952 to 1992, the Debtor owned and/or controlled a clothing store called Howard's Style Shop. 402(M) ¶ 15; Pl. Ex. 2 at Sch. I. The Debtor loaned approximately $1 million to Howard's Style Shop and then took a writeoff of this loan when SCV Corporation d/b/a Howard's Style Shop was sold. 402(M) ¶ 15.

The Trustee alleges that the Debtor loaned Howard's Style Shop at least $23,000 at some point after 1992. 402(M) ¶ 16. No such loan was disclosed on Debtor's bankruptcy schedules. Pl. Ex. 2. In support of his allegation, the Trustee has produced a facsimile which purports to be a calculation of interest on a loan to Howard's Style Shop from the Debtor. Pl. Ex. 10. Debtor has denied that he made this loan. Objections ¶ 16. The Court has no information on the preparation of the worksheet -- who prepared it, who maintained it, and the basis for their knowledge of the loan. Between the Debtor's categorical denial

and the unreliability of an otherwise unidentified interest worksheet, there is a material dispute of fact as to whether this loan even existed.

Chavin & Chavin is a partnership. The Trustee alleges that the Debtor loaned Chavin & Chavin at least $17,500 in 1992. 402(M) ¶ 17; Pl. Ex. 11. No such loan was disclosed in Debtor's bankruptcy schedules. Pl. Ex. 2. The Debtor denies loaning this amount. Objections ¶ 17. The deposition transcript that the Trustee provided to the Court to support his statement reads as follows:

> Q Okay. So, for example, on August 28th, '92, there was a $17,500 loan to Chavin & Chavin?
> A Yeah. That was probably to pay taxes.

Pl. Ex. 11.

The Court cannot discern from this statement who made the loan -- whether it was the Debtor, Chavin Enterprises, or another entity altogether. Furthermore, the Court does not know whether the loan already existed or was actually executed on that day. Construing the facts in the light most favorable to the non-movant, the Court finds that a material dispute exists as to whether Debtor loaned Chavin & Chavin $17,500 in 1992.

Chavin Enterprises

The Debtor is the president and sole shareholder of Chavin Enterprises, Inc. 402(M) ¶ 5. Chavin Enterprises, Inc. conducted business as a real estate management company both before and after the petition date. 402(M) ¶ 5. The Debtor did not disclose his ownership of the stock of Chavin Enterprises, Inc. in his bankruptcy schedules. Pl. Ex. 2. The Debtor also did not disclose that he was the president of the firm as required by Item 16 on his Statement of Financial Affairs. Pl. Ex. 2.

Debtor testified that the last time he issued a check on behalf of Chavin Enterprises was "several years ago." Chavin Deposition, August 16, 1995 ("Chavin Tr. II") at 24. Debtor later testified that he

signed checks written on the Chavin Enterprises, Inc. account at Comerica Bank as recently as May 31, 1995. Chavin Tr. III at 84-90. On the face of the matter, these two statements appear irreconcilable. The Debtor states that it was his belief, however, that Chavin Enterprises and Chavin Enterprises, Inc. were not synonymous, therefore those two statements are not inconsistent. Objections ¶ 27.

According to the facts before the Court, however, Debtor is the 100% shareholder and president of Chavin Enterprises, Inc. Chavin Deposition, April 16, 1996 ("Chavin Tr. IV") at 26-29. He has testified that Chavin Enterprises, Inc. is merely an assumed name for Leonard Chavin; in other words, that Chavin Enterprises, Inc. is "the same name as Leonard Chavin." Chavin Deposition, May 3, 1995 ("Chavin Tr. I") at 72. Therefore, Debtor himself has testified that he regards the corporation Chavin Enterprises, Inc. to be the same entity as Leonard Chavin the individual. Chavin Enterprises was operating as an unincorporated entity for many years before being incorporated as Chavin Enterprises, Inc. When it suits his purposes, Debtor claims the entities are not synonymous, but he has not raised a genuine issue of material fact. There is no material question that Debtor's statements are inconsistent.

Debtor testified at his § 341 meeting that Chavin Enterprises, Inc. was dissolved when he "went bankrupt." Chavin Deposition, September 21, 1995 at 195; 402(M) ¶ 24. The Debtor attempted to clarify that statement by noting that "[s]omebody called and said it was illegal for me to use my stationery." Chavin Deposition, September 21, 1995 at 195; Objections ¶ 24. This attempted clarification does not change his answer; Debtor still stated that Chavin Enterprises, Inc. was dissolved on his petition date. An experienced businessman who was represented by able counsel raises no material issue of fact by claiming that he confused dissolution with advice to stop using stationery. In fact, Debtor later admitted that he still owned and operated Chavin Enterprises, Inc. as of the petition date. 402(M) ¶ 25.

Finally, Debtor was asked at his § 341 meeting whether he had any interests in "small privately held

corporations." He responded that he "had no corporate entities." Chavin Tr. I at 48; 402(M) ¶ 23. He further stated that except for two carwashes, he had not held an interest in any non-public corporation since 1989. Chavin Tr. I at 57; 402(M) ¶ 24.

<u>Failure to Disclose Debts</u>

Debtor failed to disclose in his bankruptcy schedules an obligation on which he and Debra Wolinsky ("Wolinsky") were jointly liable to Glenview State Bank. 402(M) ¶ 39. The note related to the purchase of a 1993 Volvo 960, which was listed in Wolinsky's name. Debtor did not deny his liability on the Volvo note; instead, he provided the explanation that since he did not consider the car to be "primarily" his he did not include the liability on his schedules. The obligation to Glenview Bank is deemed admitted.

In 1994, Debtor renewed a guarantee of an approximately $150,000 loan that Cole Taylor Bank had made to Howard's Style Shop. 402(M) ¶ 38. Debtor affirmatively stated at his § 341 meeting that he did not renew this guarantee, Chavin Tr. I at 53, and he failed to disclose this liability in his bankruptcy schedules, Pl. Ex. 2. Debtor does not deny that he renewed the guarantee; instead, he claims that his "recollection was faulty." Objections ¶ 38. Therefore, the renewal is deemed admitted.

Debtor failed to disclose an approximately $525,000 obligation owed to Comerica Bank in connection with the Halsted Property. 402(M) ¶ 35. Debtor provided no response to the Trustee's statement that the mortgage existed and was guaranteed by the Debtor. Therefore, these facts are deemed admitted. The Debtor's deposition testimony provides insight into why this obligation was not disclosed: "[A]s of today I don't see the relevancy of it . . . . I think it was a debt that was guaranteed by a piece of property and I felt it had nothing to do with my assets or liabilities." Chavin Tr. III at 69. Debtor's reasoning is totally illogical and completely contrary to what the Code requires and what the Court expects of all debtors.

Debtor's bankruptcy schedules did not disclose an obligation of approximately $200,000 that he owed to Citibank in connection with the property at 4711 South Ashland. 402(M) ¶ 37. Debtor admitted at his § 341 meeting that he owed Citibank "$200,000 some odd thousand dollars. Let's say $200,000," in connection with a guarantee on the property at 4711 South Ashland. Chavin Tr. I at 15. Debtor failed to disclose this obligation in his bankruptcy schedules and now claims that he "thought that the property more than adequately guaranteed this loan," Objections ¶ 37. Whether there was an equity cushion on the property is irrelevant to the question of whether it was disclosed on the bankruptcy schedules. As with the Comerica guarantee, the Debtor has admitted that he knew of the existence of this obligation and affirmatively chose not to disclose it.

Failure to Disclose Assets

Debtor failed to disclose in his bankruptcy schedules that he was the owner of a sublease with a tenant at 1232 South Halsted and that he was collecting rent of approximately $4,000 per month from the subtenant. 402(M) at ¶ 18 and 19. Debtor admitted that he leased this property from Harris Bank and that he rented this space out to two subtenants, each of whom paid him $2,000 per month through April 1995. Chavin Tr. I at 9-12. Debtor argues that his obligations and rights under the lease and sublease canceled each other out, stating that the $4,000 "went to meet the lease obligation." Declaration ¶ 31. Debtor provides no documentation for this statement. He further argues that his creditors were not injured because Harris Bank would have terminated the lease if Debtor stopped paying. Objections at ¶ 18. Whether Harris Bank would have terminated the lease is neither relevant nor material; Debtor has admitted his failure to schedule the sublease and to report the income.

Debtor did not disclose the existence of two insurance policies in his bankruptcy schedules. Pl. Ex. 2. The Trustee learned about the policies through discussions with his special counsel, and he eventually

liquidated the policies and received proceeds of approximately $60,000. Pl. Ex. 3 at ¶ 7. The Debtor states that he did not know that he still had an interest in the life insurance policies at the time his petition was filed. Objections ¶ 13. Instead, he thought that First Bank Southeast had successfully levied on the insurance. Declaration ¶ 34. Debtor provides no evidentiary support for his conclusion that the policies had no value. He knew that First Bank Southeast had brought an action to recover the proceeds and he had a duty to investigate whether he still had an interest in the policies at the time his schedules were filed.

The Debtor stated at Question 1 of his Statement of Financial Affairs that he earned approximately $40,000 per year from 1990 through 1994 from "Howard [sic] Style Shop, Flea Market, and general employment." Pl. Ex. 2. However, his tax returns for the years 1990 through 1994 reflect income of $1,886,111. Defendant argues that in his response on the bankruptcy schedules he meant only that he had income from Howard's Style Shop of $40,000 per year. Objections ¶ 41. He blames the paralegal who assisted him with the statement of financial affairs and claims that there was a miscommunication. Declaration ¶ 12 and 13. Whether there was a misunderstanding at the time the paralegal was questioning Chavin is irrelevant; the Defendant reviewed and signed his statement under penalty of perjury. There is no material question that the statement of income was false. Furthermore, Question 2 of the Statement of Financial Affairs asks whether the debtor had any income "other than from employment or operation of business," and the box marked "None" is checked off. Pl. Ex. 2. If the Debtor thought that Question 1 only covered income from Howard's Style Shop, he had an opportunity to amplify the record through his answer to Question 2.

As of the petition date, the Defendant owned an option to purchase 17,250 shares of stock in General Employment, Inc., a publicly traded company, at a significantly below market price. 402(M) ¶ 9. The Defendant failed to disclose ownership of this option in his bankruptcy schedules. Pl. Ex. 2.

Debtor agrees that he had an option to purchase the shares, and that he did not disclose this option on his bankruptcy schedules. Answer ¶ 77 and 78. Defendant states that he believed the option was valueless, but he does not cite any evidence as support for this statement. In fact, after identifying this asset, the Trustee liquidated the stock option and brought $70,000 into the estate.

Debtor made other statements about the value of the General Employment stock. At his § 341 meeting, the Debtor stated that in or about May, June or July of 1992, the stock "was selling for one dollar and one-eighth." Chavin Deposition, June 9, 1995 at 79-82; 402(M) ¶ 33. Only two weeks earlier, however, the Debtor testified that in 1992 the stock was trading between $2 and $2.50 per share. Chavin Deposition, May 25, 1995 at 114; 402(M) ¶ 33.

The Debtor responds by denying that the two statements were irreconcilable and claiming that one of the statements was made in light of an appellate court's ruling which affected the price of the stock. Upon review of the transcript, the Court finds that Debtor's June 9, 1995 testimony does cover the topic of an adverse court ruling; thus, there is a question of material fact as to whether that ruling actually had such an impact and if so, whether Debtor's May 25, 1995 testimony concerned a time prior to that ruling.

A November 1994 letter agreement from an entity called Rainbow Apparel Companies ("Rainbow") outlined an agreement with Chavin that they would split "any termination fees that Rainbow secures for Walgreen's on a termination of their overlease." Pl. Ex. 8. Although there is a question of fact as to whether this letter was the final agreement between the parties, the Court need not resolve that issue. Instead, the Court can rely on the Debtor's own testimony. He testified that he contacted Rainbow, put a transaction together, and that sometime around March 1995 he received a check for one-half of the $150,000 termination fee. Chavin Tr. III at 112-114. Although the letter from Rainbow is dated November 1994, there is a question of material fact as to whether there actually was an executory contract

at the time Debtor filed his bankruptcy schedules.

Debra Wolinsky and the Chavin Divorce

Debtor had an extended extramarital affair with Wolinsky, with whom he had three sons. Answer ¶ 79 and 81. At his § 341 meeting the Debtor stated that Marlene Chavin, his ex-wife ("Marlene"), did not learn of his relationship with Wolinsky until mid or late 1992. 402(M) at ¶ 20 to 22; Chavin Tr. II at 92-93. Marlene testified, however, that she knew by November 1989 of Defendant's relationship with Wolinsky. M. Chavin Deposition, September 20, 1995 at 81.

Debtor claims that he was confused when he stated that Marlene learned about Wolinsky in 1992: "The years were confusing to me at the time I testified on August 16, 1995. I was confused." Objections at ¶ 22. In his Declaration, the Defendant "admit[s] that I do not know for sure when Marlene found out about Debra." Declaration at ¶ 23. The Debtor has not denied Marlene's statement; instead, he offers an explanation for why his statement conflicts with hers. This explanation is insufficient; there is no question that the two statements conflict and the Debtor has failed to support either statement with evidence.

Debtor stated at his § 341 meeting that he did not collect rents on the properties he transferred to Marlene after their divorce. 402(M) ¶ 28. In April 1994, however, the Debtor admitted under oath that he continued to manage the properties for eight months after the divorce and that he received $7,000 per month for doing so. 402(M) ¶ 28. Debtor splits a very thin hair when he points out that the wording of the Trustee's question leads to the conclusion that he did not make a false statement at his § 341 meeting:

> Q: Now, since the transfer of your interest in these properties to your wife, do you still collect the rents on any of those properties?
> A: No, I do not.

Pl. Ex. 23 (emphasis added). In determining how thinly that hair has been split, the Court must view it in

the light most favorable to the Debtor. Therefore, the Court finds that a material dispute of fact exists as to whether Debtor made a false statement at his § 341 meeting regarding the post-divorce collection of rents on the properties that were transferred to Marlene.

Financial Statement

On or about April 20, 1992, the Debtor signed a financial statement reflecting a net worth of $6,103,000, and he provided this statement to First Bank Southeast. At his § 341 meeting, Debtor claimed that this statement ("Pl. Ex. 26") had been "altered," was a "fictitious document," should have been dated "1988" and contained "figures [that] were not put in [the financial statement] at the same time." 402(M) at ¶ 29 and 30. The Trustee provided the Court with the affidavit of Dale Welke ("Welke"), an assistant vice-president of the successor to First Bank Southeast. Welke affirms that the Defendant provided this financial statement to the bank as part of a loan refinancing package. Welke had custody over the files in which the statement was kept and to the best of his knowledge it was neither altered nor changed. "To the contrary, [the statement] attached hereto is in the exact form, shape and condition as it was at the time Mr. Chavin provided it to First Bank Southeast." Pl. Ex. 29. Debtor cites no evidence supporting his conclusory statements that the financial statement was altered or in any way different from what was submitted to First Bank Southeast. Therefore, the Trustee's factual assertion that the May 1, 1992 financial statement was not altered or changed is deemed admitted.

Misstatements and Contradictions

Debtor stated at his § 341 meeting that "I don't have any management business anymore." Chavin Tr. I at 82. Debtor now clarifies that statement by arguing that when he said he did not have any management business he meant himself personally, not Chavin Enterprises, Inc., of which he is the 100% shareholder. Objections ¶ 28. However, Debtor later testified that as to the Halsted Property, "I am still

managing the properties . . . . I am managing it by myself." Chavin Tr. IV at 18. Furthermore, Defendant states in his Declaration that "[t]he stock of Chavin Enterprises, Inc. has no value. It has no assets. It is the corporate form through which I did management." Declaration ¶ 30. Defendant himself admits that Chavin Enterprises, Inc. is a shell corporation through which he acts. Therefore, he made a false statement by stating that he doesn't "have any management business anymore."

Debtor stated under oath that the property at 5200 West Washington was worth $100,000 at the time of his September 1993 divorce. Chavin Deposition, June 9, 1995 at 37. Yet the Debtor testified at another deposition that the property was only worth $30,000 at the time of the transfer of a deed in lieu of foreclosure, around mid-1994. Chavin Tr. I at 27. Debtor did not respond to the allegation that his statements conflict in his Objections. According to his Declaration, this property "has had a downturn for the worse both in the amount of space leased and the condition of the building," so it was reasonable for him to decide that the value had declined from $100,000 to $30,000. Declaration at ¶ 32. Debtor provides no evidentiary support for his conclusory statements.

The Trustee has alleged that Debtor has not produced records relating to Chavin Enterprises, Inc. or Chavin Enterprises. 402(M) ¶ 43. The Debtor responds by denying that he has any records under his control which he has failed to produce. 402(M) ¶ 43. The Court has no knowledge about which records have been requested and of those requested what has been produced; therefore, questions of material fact exist on this issue.

DISCUSSION

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, that there be "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-586 (1986). Once the motion is supported by a prima facie showing that the moving party is entitled to judgment as a matter of law, a party opposing the motion must show that there is a genuine issue for trial. Patrick v. Jasper County, 901 F.2d 561, 564-566 (7th Cir. 1990). All reasonable inferences to be drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1440 (7th Cir. 1992).

Section 727 is strictly construed against the objector and liberally in favor of a debtor. Bank of India v. Sapru (In re Sapru), 127 B.R. 306, 314 (Bankr. E.D.N.Y. 1991). One of the fundamental underpinnings of bankruptcy policy is theory that "honest but unfortunate" debtors deserve a fresh start. Grogan v. Garner, 498 U.S. 279, 286 (1991). "However, the policy in favor of providing the honest debtor with a fresh start must be weighed against the countervailing policy of ensuring that dependable information is available to those interested in the bankruptcy estate." Sapru, 127 B.R. at 314.

Count I

The adversary complaint requests denial of discharge on four separate counts. The first count is brought under 11 U.S.C. § 727(a)(4). Pursuant to this section, the Court shall grant the debtor a discharge unless "the debtor knowingly and fraudulently, in or in connection with the case -- (A) made a false oath or account."

For a debtor to be barred from discharge pursuant to 11 U.S.C. § 727(a)(4)(A), the plaintiff must prove by a preponderance of the evidence that: (1) debtor made a statement under oath; (2) the statement

was false; (3) debtor knew the statement was false; (4) debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. Bensenville Community Center Union v. Bailey (In re Bailey), 147 B.R. 157, 162 (Bankr. N.D. Ill. 1992) (hereinafter "Bensenville").

All of the statements that the Trustee has put into issue were made under oath; each concerns either the Debtor's bankruptcy schedules or testimony at the § 341 meeting of creditors. The bankruptcy petition, schedules of assets and statement of affairs "must be under oath. It is here that debtors tend to run into difficulties." Ginsberg & Martin on Bankruptcy § 11.02[E]. Furthermore, a debtor's testimony at a § 341 meeting of creditors is taken under oath. 11 U.S.C. § 341; Fed. R. Bankr. P. 2003(b)(1). Therefore, the first element is satisfied as to all statements that the Trustee has put into issue.

The second issue is whether any false statements or material omissions were actually made. Based on the undisputed facts, Debtor failed to disclose or made false statements about the following items:

- his interest in the Halsted Property or in Maxwell Street Associates;
- $17,000 of income received during 1994 from the Halsted Property;
- his ownership of the stock of Chavin Enterprises, Inc.;
- that he was president of Chavin Enterprises, Inc.;
- whether Chavin Enterprises, Inc. was still being operated on the petition date;
- whether he had owned an interest in any non-public corporations since 1989;
- the last time he issued a check on behalf of Chavin Enterprises;
- the debt to Glenview State Bank secured by the Volvo;
- the guarantee of the $150,000 loan made by Cole Taylor Bank to Howard's Style Shop;
- the guarantee of the $525,000 obligation owed to Comerica Bank in connection with the Halsted Property;
- the $200,000 obligation owed to Citibank in connection with the property at 4711 South Ashland;
- the sublease at 1232 South Halsted;
- two insurance policies;
- his actual income for the years 1990 through 1994;
- his option to purchase 17,250 shares of General Employment, Inc.;
- whether he had any management business at the time of his § 341 meeting; and
- when Marlene Chavin learned of his affair.

The third and fourth elements are whether the debtor knew that the statements were false, yet made

those statements anyway with fraudulent intent. Debtor provides two different explanations for his various misstatements. First, Debtor states that he failed to disclose certain assets because he thought they had little or no value. However, bankruptcy law requires that when a debtor is in doubt as to whether an asset should be disclosed, "he is obligated to disclose" it. 1 Ginsberg & Martin on Bankruptcy § 11.02[E]. Debtor does not deny that he knew the assets existed, only that he chose not to list them because he doubted their value. That is not a choice available to a debtor. In the interests of providing the Court and the trustee with the most complete financial picture possible, a debtor must disclose even those assets whose value is unclear.

Second, Debtor claims that many of the remaining omissions were the result of innocent mistakes. This is not an unusual posture; rarely will there be direct evidence of a party's fraud. However, "the Court may deny a discharge to the debtor under § 727(a)(4) where fraudulent intent may be inferred in light of the specific facts and circumstances of the case before the court. The cumulative effect of a number of false oaths by the debtor with respect to a variety of matters establishes a pattern of reckless and cavalier disregard for the truth by the debtor." Community Bank of Homewood-Flossmoor v. Bailey (In re Bailey), 145 B.R. 919, 928 (Bankr. N.D. Ill. 1992) (hereinafter "Homewood-Flossmoor").

In the instant case, the Debtor made over a dozen false statements or oaths with respect to a wide variety of financial items. A "pattern of reckless and cavalier disregard for the truth" is clearly in evidence. For these reasons, the Court finds that despite his protestations to the contrary, the Debtor knew that he was making false statements and he made those statements with fraudulent intent.

Finally, the Court must decide whether these statements are material enough to bar the Debtor's discharge. When taken independently, each misstatement or omission appears inconsequential. But the Court is charged with considering all the facts and circumstances, and the sheer number of false statements

is too great to ignore. “[E]ven if each falsehood or omission considered separately may be too immaterial to warrant a denial of discharge pursuant to § 727(a)(4)(A) certainly the multitude of discrepancies, falsehoods and omissions taken collectively are of sufficient materiality to bar the Debtor’s discharge.” Sapru, 127 B.R. at 316. The Debtor failed to disclose more $2 million in income and assets and more than $1 million of obligations. These amounts are far from insignificant. After consideration of all facts and circumstances and taking into account that all questions must be resolved in the light most favorable to the Debtor, the Court finds that these misstatements and omissions are material. The Trustee has met his burden of proof, both under the standard for summary judgment and for the five elements of § 727(a)(4)(A). Summary judgment will be granted for the Trustee as to Count I.

Count II

The Trustee has also pled a count for denial of discharge under 11 U.S.C. § 727(a)(2). Pursuant to this section, the Debtor’s discharge may be denied if

> with intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed --
> (A) property of the debtor, within one year before the date of the filing of the petition; or
> (B) property of the estate, after the date of the filing of the petition.

The Trustee has alleged that the Debtor disclosed, concealed or transferred the following items:

C approximately $16,000 received from subleasing property at 1232 South Halsted;
C his direct or indirect ownership or similar interest in the Halsted Property and/or Maxwell Street Associates;
C the option to purchase 17,250 shares of General Employment stock;
C the stock of Chavin Enterprises, Inc.;
C the insurance policies;
C income received post-petition from the Halsted Property; and
C income received during 1994.

This ground for discharge requires that three elements be satisfied. First, Plaintiff must prove that the Debtor actually concealed property which would have become property of the estate. There is no question that Debtor omitted these items from his statement of financial affairs and that these are all items which Debtor was required to disclose. Although a "[m]ere failure to volunteer information to creditors . . . fall[s] short of 'concealing.' . . . [A] debtor's failure to list valuable property on the schedule of assets . . . constituted fraudulent concealment." 4 Collier on Bankruptcy ¶ 727.02 at 727-31 to 727-33 (15th ed. 1995). The critical issue is whether property has been concealed, not whether a transfer has been concealed. Rosen v. Bezner, 996 F.2d 1527 (3rd Cir. 1993). There is no material question that Debtor concealed his ownership of property which would have become property of the estate.

Second, Plaintiff must satisfy a timing requirement. The Trustee must show that Debtor concealed the property within one year before the date of the filing of the petition or after the petition was filed. Since these items were not actually transferred but concealed by the Debtor from the time of filing until uncovered by the Trustee or revealed in some other manner, this element is satisfied.

Finally, Plaintiff must prove Debtor's actual intent to defraud; constructive intent is insufficient. "However, because debtors rarely leave direct evidence of their intent to defraud creditors, courts have long examined the facts and circumstances surrounding a transaction to determine the debtor's intent." Homewood-Flossmoor, 145 B.R. at 926-927. As the Court described in its analysis of Count I, it cannot ignore the factual context of the case. Debtor concealed not one, but many items which would have become property of the estate. The value of those items amount to hundreds of thousands of dollars. Based on the facts and circumstances on which no questions of fact exist, there is no other reasonable conclusion than that the Debtor concealed this property with intent to defraud. Summary judgment will be granted for the Trustee as to Count II.

Count III

The Trustee has also requested that Debtor's discharge be denied pursuant to 11 U.S.C. § 727(a)(3). This section provides that a discharge may be denied when "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."

The Seventh Circuit analyzed this section of the Bankruptcy Code in a recent decision. In re Juzwiak, 89 F.3d 424 (7th Cir. 1996). The Circuit noted that this section

> requires as a precondition to discharge that debtors produce records which provide creditors 'with enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present.' The provision ensures that trustees and creditors will receive sufficient information to enable them to 'trace the debtor's financial history; to ascertain the debtor's financial condition; and to reconstruct the debtor's financial transactions.' 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). On the other hand, courts and creditors should not be required to speculate as to the financial history or condition of the debtor, nor should they be compelled to reconstruct the debtor's affairs.

Juzwiak, 89 F.3d at 427-428 (citations omitted). The Juzwiak panel reversed the bankruptcy court's finding that the debtor's records were sufficient. In so doing, the Circuit found that "[t]he debtor has the duty to maintain and retain comprehensible records." Id. at 429. The bankruptcy court "seemed heavily influenced" by the lack of evidence of fraud, finding that the destruction or concealment of existing records was the "main thrust" of § 727(a)(3). Id. at 430.

The Circuit disagreed, finding the bankruptcy court's interpretation to be incorrect. Instead, "creditors do not need to prove that the debtor intended to defraud them in order to demonstrate a § 727(a)(3) violation." Id. (citations omitted). Creditors need not prove scienter; in fact, the burden is on

the debtor to show that the unique circumstances of his case justified the failure to keep records properly.

In the instant case, the Trustee has alleged that the Debtor admitted destroying and/or concealing certain documents related to Chavin Enterprises. The Debtor denies having any records that he has failed to produce, and alleges that most records were not returned by Wolinsky's attorney and accountant. Objections ¶ 43 and 44. At a deposition, however, the Debtor admitted destroying some records pertaining to Chavin Enterprises; because Wolinsky's attorney requested records pertaining to certain time periods, the Debtor destroyed any records pertaining to the years prior to her request. Chavin Tr. II at 19.

As the Trustee points out, Wolinsky's attorney requested these records in 1993, and the Debtor's reasoning contains a logical flaw -- what happened to post-1993 records? Additionally, Wolinsky's attorney has signed an affidavit in which she testifies that after obtaining "copies of documents relating to Leonard's income and extensive business operations . . . . [which] partially related to a business operated by Mr. Chavin which is known as Chavin Enterprises. . . . I returned to Chavin's attorneys and accountants all of the original documents that they provided to me, including the documents relating to Chavin Enterprises. . . . The original documents that I had received were returned in substantially the same condition as they were in when I received them." Aff. of Lydia Gross Kamerlink, May 24, 1996.

Because the Court must view all reasonable inferences in a light most favorable to the Debtor, it will take as true the Defendant's statements -- that he only destroyed those documents that Wolinsky did not request and that he has produced all documentation currently in his possession. The Defendant is a businessman who has had extensive real estate holdings. He offers as an excuse the explanation that he is "a missing link to the past. For many years I have been doing business in real estate and I did not retain papers. I knew what was going on and others probably had papers memorializing the events. My word

was my bond." Declaration ¶ 29. The Court is mindful of the fact that some individuals are more meticulous recordkeepers than others. But even the average taxpayer must keep some records in writing, and the Debtor has far more extensive wheelings and dealings than our hypothetical taxpayer. No amount of yearning for the good old days when a man's word was his bond can get the Debtor past § 727(a)(3). Congress has charged the courts with the duty of denying a debtor's discharge if he fails "to keep . . . any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained." There is no exception for debtors who do not believe in good recordkeeping.

But the Court has little information on which records have been requested and what has ultimately been produced. Without this information, the Court cannot grant summary judgment for the Trustee; requests for denial of discharge are strictly construed against the objector. Therefore, summary judgment is denied as to Count III.

<u>Count IV</u>

Finally, the Trustee has moved for summary judgment on Count IV of his adversary complaint. This count requests a finding that discharge should be denied under 11 U.S.C. § 727(a)(5). Pursuant to this section, the court may not grant a debtor a discharge if "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities."

According to Pl. Ex. 26, the personal financial statement, the Debtor had a net worth of $6,103,000 as of April 20, 1992. Not even three years later the Debtor reported that he owned total assets of $27,965 and had a <u>negative</u> net worth of approximately $1.9 million.

"The gist of this ground for denying a discharge is that creditors, the court, and the trustee are

entitled to an explanation of how the debtor wound up in bankruptcy. The debtor has a duty to make that explanation and to make it adequately -- that is, it must be plausible and accurate." 1 Ginsberg & Martin on Bankruptcy § 11.02[F] (footnote omitted). "The [Trustee] has the initial burden of identifying the assets in question by showing that the Debtor at one time had the assets but they are no longer available for the debtor's creditors. However, once the creditor has shown . . . the disappearance of substantial assets, the burden shifts to the debtor to explain satisfactorily the losses or deficiencies." Homewood-Flossmoor, 145 B.R. at 925. The case law requires a satisfactory explanation from the debtor. See In re D'Agnese, 86 F.3d 732, 734 (7th Cir. 1996) ("Under § 727(a)(5), a satisfactory explanation 'must consist of more than . . . vague, indefinite, and uncorroborated' assertions by the debtor.") (citation omitted).

In D'Agnese, the Seventh Circuit upheld a bankruptcy court's denial of discharge based on a finding that the debtor had failed to adequately explain the disposition of substantial assets. The bankruptcy court in D'Agnese, however, had held a trial before making its findings. By pointing out the Debtor's enormous decrease in net worth to the Court, the Trustee has raised the question of whether the Debtor should be denied a discharge pursuant to § 727(a)(5). The Debtor has alleged that he conveyed most of his assets to his wife pursuant to their divorce. Declarations at ¶ 40. Although Debtor's explanation must consist of more than vague assertions and it would have been preferable for the Debtor to amplify his explanation, the Court has little information concerning the Debtor's divorce. Since questions of material fact exist as to whether this allegation is sufficient to explain the decrease in Debtor's net worth, summary judgment is denied as to Count IV.

CONCLUSION

For the reasons stated above, the Court denies the Debtor's motion for summary judgment. The Court grants the Trustee's motion for summary judgment on Counts I and II and denies the Trustee's

motion for summary judgment on Counts III and IV. This adversary proceeding is set for status on October 8, 1996.

ENTERED:

Date:

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SUSAN PIERSON SONDERBY