

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: CHARLES SANFORD MCCARSON

CASE NO. 04-17102

MELISSA KATHRYN MASSEY MCCARSON

PLAINTIFF

VERSUS

ADV. PROC. NO. 05-1026

CHARLES SANFORD MCCARSON

DEFENDANT

OPINION

On consideration before the court is a complaint filed by Melissa Kathryn Massey McC Carson, (hereinafter “plaintiff”), to revoke the bankruptcy discharge previously granted to the defendant/debtor, Charles Sanford McC Carson, (hereinafter “defendant”); an answer and counter-claim having been filed by the said defendant; on proof in open court; and the court, having heard and considered same, hereby finds as follows, to-wit:

I.

The court has jurisdiction of the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157. This is a core adversary proceeding as defined in 28 U.S.C. §157(b)(2)(A), (J), and (O).

II.

In the pretrial order, entered in this proceeding, the parties stipulated to the following facts, to-wit:

- A. The plaintiff secured a judgment in the Chancery Court of DeSoto County, Mississippi, in Cause Number 02/2/177(b) against the defendant in the amount of \$28,416.16, plus costs and interest at the legal rate on December 13, 2002.
- B. The judgment granted a lien on the defendant’s real and personal property.

- C. The judgment further ordered the defendant to vacate and remove all his personal property from the plaintiff's real property.
- D. The judgment ordered the defendant to comply with any and all environmental clean up requirements.
- E. The judgment in favor of the plaintiff herein was affirmed on a petition to rehear and no appeal was perfected by defendant.
- F. The Chancellor ruled that the defendant was not entitled to claim a homestead exemption as to the plaintiff specifically holding:

“the lien of this judgment shall attach to all the real and personal property of Charles Sanford McCarson and shall not be subject to any homestead exemption in so far as this lien attaches to the 2.2 acres owned by Charles Sanford McCarson as identified in that certain Quit Claim Deed from Kathryn M. McCarson to Charlie McCarson recorded in Book 307 at Page 457 in the office of the Chancery Clerk of Desoto County, Mississippi, said instrument having been filed for record October 10th, 1996 at 11:08 A.M.”

- G. The plaintiff was not included on the defendant's matrix and never received notice of the defendant's Chapter 7 bankruptcy filing.
- H. The defendant's home is located on 2.2 acres and contains approximately 1,800 heated square feet. Also located on the property is a quonset hut used by the defendant as a mechanic shop and storage facility for multiple vehicles.
- I. The defendant built his new home in late 2002.
- J. The defendant filed for relief under Chapter 7 of the United States Bankruptcy Code on May 7, 2003, in the Western District of Tennessee, Western Division.
- K. The defendant had a meeting of creditors on June 4, 2003, which meeting was without notice to the plaintiff.
- L. The defendant received a Chapter 7 discharge in the Western District of Tennessee on August 19, 2003.
- M. The defendant is a resident of the State of Mississippi whose permanent residence address is 7660 McCarson Lane, Walls, DeSoto County, Mississippi.
- N. This is a core proceeding under 28 U.S.C. §157(b)(2)(O), and thus jurisdiction is proper.

- O. The plaintiff was not listed as a creditor in the defendant's schedules. However, the statement of affairs reflected the existence of the litigation between the parties and the entry of a judgment, but did not clearly identify which party was the debtor and which party was the creditor.
- P. The original complaint to revoke the defendant's discharge was brought by the plaintiff within one (1) year of the original discharge being granted in the Western District of Tennessee.
- Q. The defendant filed his voluntary petition showing estimated assets of \$50,000 to \$100,000, and estimated debts in excess of \$100,000.
- R. Defendant's home is valued at over \$100,000 on the tax rolls of DeSoto County, Mississippi, as of November 9, 2005.
- S. The defendant was represented in his Chapter 7 case by Ronald Taylor, Esq.
- T. At the time the judgment was entered in December, 2002, the defendant owned real property located at 7660 McCarson Lane, Walls, Mississippi. A notice of lis pendens was not filed against his property at any time during the pendency of the lawsuit.
- U. The defendant claimed said real property as his homestead property and exempted any equity in said property on his Schedule C.
- V. The defendant's petition and schedules were completed with the assistance of Ronald Taylor's office.

III.

The defendant in this proceeding initially filed a cause of action against the plaintiff herein, who is the defendant's mother, in the Chancery Court of DeSoto County, Mississippi, seeking to establish a constructive trust as to the plaintiff's residential real property. In that cause of action, the plaintiff filed an answer and counterclaim seeking to have the defendant removed from her property, as well as, for unpaid rent and damages. On December 13, 2002, the Chancery Court dismissed the defendant's complaint for a constructive trust and awarded the plaintiff damages in the total sum of \$28,416.16, based on her counter-claim. The decision also

directed the defendant to clean up and vacate the plaintiff's property. The defendant filed a motion to reconsider, but this was denied on February 24, 2003. The defendant did not prosecute an appeal.

Several years earlier, the plaintiff had deeded the defendant 2.2 acres which adjoined her property. In the order awarding the aforesaid judgment to the plaintiff, the Chancery Court included the following provision: "...the lien of this judgment shall attach to all the real and personal property of Charles Sanford McCarson and shall not be subject to any homestead exemption in so far as this lien attaches to the 2.2 acres owned by Charles Sanford McCarson as identified in that certain Quit Claim Deed from Kathryn M. McCarson to Charlie McCarson recorded in Book 307 at Page 457 in the Office of the Chancery Clerk of DeSoto County, Mississippi, said instrument having been filed for record October 10th, 1996 at 11:08 A.M...."

On May 7, 2003, the defendant filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Western District of Tennessee. The plaintiff was not listed as a creditor and was not noticed of the bankruptcy filing. The defendant received a Chapter 7 discharge on August 19, 2003, and the bankruptcy case was thereafter closed.

On May 3, 2004, the plaintiff filed a motion to reopen the bankruptcy case so that she could file the complaint, which is now before this court, to revoke the defendant's discharge. The plaintiff timely filed her complaint on June 21, 2004, which was followed by an amended complaint filed on June 28, 2004. As a result of a motion filed by the Chapter 7 trustee, the venue of the bankruptcy case was transferred to the Northern District of Mississippi.

After the bankruptcy case was reopened, the defendant never amended his schedules to add the plaintiff as a creditor. The plaintiff also never filed an objection to the defendant's

homestead exemption claim which he had asserted in his bankruptcy schedules despite the language appearing in the DeSoto County Chancery Court order. (Parenthetically, the court would note that the Chancery Court order did not prohibit the defendant from claiming his homestead exemption as to his other creditors, only as to his mother, the plaintiff herein.) Because there was no timely objection to his homestead exemption claim, the defendant, in his counter-claim filed in this proceeding, seeks to avoid the plaintiff's judicial lien insofar as it impairs his homestead exemption. For reasons that will become apparent, the court will not have to address this issue.

IV.

In addressing the plaintiff's complaint to revoke the defendant's discharge, the court has considered the following events:

A. After the plaintiff obtained the aforementioned judgment against the defendant, the defendant filed for bankruptcy relief in the Western District of Tennessee even though he had no connection whatsoever to that jurisdiction. For decades, the defendant has resided in the State of Mississippi where all of his real and personal property is located. Since he has not held a job since the late 1970's, he is clearly not employed in the State of Tennessee. No creditor was listed with a Tennessee address. According to his testimony, the defendant's primary reason for filing the bankruptcy case was because of the plaintiff's judgment. Inexplicably, he then neglected or purposely excluded her as a creditor.

B. On his Schedule B - Personal Property, the debtor listed that he owned household

goods, wearing apparel, one pistol, a 1994 Dodge Spirit, and a 1968 Ford pickup truck, all having a total value of \$1,050.00. During cross-examination at trial, the debtor admitted that he did not disclose the following:

1. A pre-petition personal injury cause of action which he thought was worth \$33,000.00.
2. A checking account containing \$500.00.
3. An International tractor and bush hog.
4. Rolling toolboxes with assorted tools.
5. Air compressors.
6. Three trailers.
7. Assorted automobile parts.
8. One tanning bed.

As justification for his failure to disclose, the defendant testified that he was not asked questions about his ownership of the aforesaid items by his bankruptcy attorney or the paralegal/clerk person in his attorney's office. He indicated that he only answered questions that were asked of him. If a question about a particular asset was not asked, the existence of the asset was simply not disclosed. He also indicated that most of the undisclosed assets were either inoperable or simply junk. After reviewing photographs of the defendant's property, the court would agree that many of the items would be considered junk, but this would certainly not apply to all of the items listed above.

The court also recalls that the defendant testified that he had filed a previous bankruptcy

case and generally understood his responsibilities as a debtor in bankruptcy.

C. Listed in the preceding paragraph is a personal injury cause of action that existed in favor of the debtor prior to the time that he filed his bankruptcy case. The defendant indicated that he made substantial charges on his credit cards in anticipation that he would receive approximately \$33,000.00 from this cause of action which he would use thereafter to repay the credit card debt. He then indicated that he was told by his attorney that he should settle the cause of action prior to filing bankruptcy or “the court would get all of the proceeds.” Based on this alleged advice, the defendant did indeed settle the lawsuit, but received nothing for himself or his creditors. The settlement occurred on May 22, 2003, which was subsequent to his bankruptcy filing. As a result, the Chapter 7 trustee had no notice of the cause of action which legally belonged to the defendant’s bankruptcy estate. The settlement was obviously not approved by the bankruptcy court in the Western District of Tennessee, and thus the Chapter 7 trustee and the bankruptcy estate were deprived of a potential asset that could have been utilized for the benefit of the estate’s creditors. This conduct on the part of the defendant, standing alone, is sufficient to revoke his discharge for fraud.

D. Over the objection of the defendant’s current attorney, several credit card statements applicable to the defendant’s credit cards were introduced into evidence. These statements revealed that the defendant was largely credit card “debt free” as of December 31, 2002, but that prior to his filing bankruptcy on May 7, 2003, he had incurred total charges on his credit cards in a sum exceeding \$46,000.00. Many of the substantial charges were for cash advances or for gift cards.

One of the more unusual charges on the credit cards involved the purchase of gift

cards to acquire two Sony plasma screen television sets from Best Buy for the sum of \$9,458.74. The defendant indicated that this was done in order to repay a debt that he owed to William “Buddy” Smith, a deputy sheriff with the Sheriff’s Office of Shelby County, Tennessee. The defendant, for unexplained reasons, indicated that he owed Smith a debt of approximately \$10,000.00. The two television sets were purchased with the gift cards to repay Smith who wanted to give them to his wife as a surprise anniversary gift. The gift idea was not consummated because Smith’s wife did not particularly like the picture quality. Strangely, the two television sets have been kept at the defendant’s home since their delivery date of March 14, 2003, approximately four years ago. Significantly, the defendant did not disclose that he had repaid the \$10,000.00 debt owed to Smith within weeks of his bankruptcy filing.

E. On December 20, 2002, within approximately five months of his bankruptcy filing, the defendant sold six vehicles to Michael Brower for the sum of \$500.00. The vehicles were described as junk cars, and the court cannot disagree with this assessment. However, none of the vehicles were ever removed from the defendant’s property, and the defendant still drives one of the vehicles, a 1991 Chevrolet S-10 pickup truck. The court mentions this sale only because it was yet another transaction that was not disclosed by the debtor in his bankruptcy schedules.

V.

Although the defendant is a person of reasonable intellect and is no stranger to the filing of a bankruptcy case, he now blames the inadequate disclosures on his bankruptcy attorney. While there does appear to be a lack of due diligence on the part of the attorney in preparing and filing the bankruptcy petition, schedules, and statement of affairs, the defendant executed these

documents under oath asserting that they were true and correct. The Fifth Circuit Court of Appeals has made it clear that a bankruptcy debtor is not entitled to a discharge where that debtor makes statements, under oath, with reckless indifference to the truth. *See, In re Sholdra*, 249 F.3d 380, 382 (5th Cir. 2001) (citing *Mazer v. United States*, 298 F.2d 579, 582 (7th Cir. 1962).) *See also, Swicegood v. Ginn*, 924 F.2d 230, 232 (11th Cir. 1991).

Insofar as reliance on the advice of counsel is concerned, *In re Gartner*, 326 B.R. 357 (Bankr. S.D. Tex., 2005), provides the following insight:

A debtor can defend against claims brought under section 727(a)(4) by asserting reliance on attorney advice. However, this defense is only available where the debtor's reliance was reasonable and in good faith. *In re Dreyer*, 127 B.R. 587, 597 (Bankr. N.D. Tex. 1991) (citing *In re Weber*, 99 B.R. 1001, 1018 (Bankr. D. Utah 1989)). The reasonableness of the debtor's reliance is undermined where the debtor has admitted under oath to having read and signed the Schedules and Statement of Financial Affairs that are challenged in the adversary proceeding. *Dreyer*, 127 B.R. at 597. Evidence of the debtor's intent to omit information from the bankruptcy petition undermines the debtor's assertion of good faith *Id.* at 598.

326 B.R. at p. 374.

There are just too many things glaringly wrong with this bankruptcy case. Initially, the case was filed in an improper venue, a district which had absolutely no connection to the defendant. There was a failure to disclose several assets, particularly the defendant's pre-petition personal injury cause of action which appears to be intentionally omitted. The defendant failed to disclose the transfer of assets within months of the filing of his bankruptcy petition, as well as, the repayment of sizeable debts, particularly the repayment of the \$10,000.00 indebtedness purportedly owed to William "Buddy" Smith, through the acquisition of the two plasma screen television sets which the defendant still retains. An examination of the defendant's credit card statements indicates that he flagrantly abused the availability of credit by

obtaining cash advances and gift cards in significant amounts within weeks of his bankruptcy filing. The totality of these circumstances leads the court to the inescapable conclusion that the defendant's discharge, which he surreptitiously obtained while this case was pending in the Bankruptcy Court for the Western District of Tennessee, should be revoked. It was irrefutably obtained through the fraud of the debtor as contemplated by §727(d)(1) of the Bankruptcy Code.

A separate order will be entered consistent with this opinion.

This the 6th day of April, 2007.

/s/ David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE