United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In Re: Christopher Lynn Dameron

Bankruptcy Number: 03 B 16263

Adversary Caption: Shawn DeAmicis vs. Christopher Lynn Dameron

Date of Issuance: November 29, 2005

Judge: Pamela S. Hollis

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	
CHRISTOPHER LYNN DAMERON,	)	Case No. 03 B 16263
Debtor.	)	Chapter 7
	)	Judge Pamela S. Hollis
SHAWN DeAMICIS,	)	
Plaintiff,	)	Adversary No. 03 A 02122
	)	
	)	
	)	
CHRISTOPHER LYNN DAMERON,	)	
Defendant.	)	

MEMORANDUM OPINION

In this adversary proceeding, Plaintiff DeAmicis requests the court to deny Debtor Dameron's discharge pursuant to 11 U.S.C. § 727 and to declare a judgment obtained by Plaintiff against Debtor in state court non-dischargeable under 11 U.S.C. § 523. After holding an evidentiary hearing on the Amended Complaint, and reviewing the exhibits submitted at trial, the court enters judgment in favor of Plaintiff on all counts of the Amended Complaint. Additionally, Defendant's Motion in Limine, seeking to bar evidence in support of Count II of the Amended Complaint, is denied.

Findings of Fact

1. On or about March 6, 2003, Plaintiff obtained a default judgment against Debtor in the amount of $72,173.30 in the Circuit Court of Cook County, Illinois, First Municipal District.

2. The judgment was entered pursuant to a Verified Complaint filed against the Debtor, which essentially alleged that Debtor Defendant, d/b/a CLD Builders, entered

into a contract to perform certain renovation and construction work in Plaintiff's condominium, took money from Plaintiff for the work and materials, but failed to complete the work described in the contract in a timely and professional manner.

3. The state court complaint further alleged that Plaintiff suffered damages as a direct proximate cause of Debtor's breaches of the contract. These damages included the monies paid to the Debtor for the original contract, as well as monies paid to new contractors for costs and materials incurred to complete the renovation project following Debtor's breach of the original renovation contract.

4. Shortly after Plaintiff obtained the judgment against Debtor in state court, Debtor filed this bankruptcy on April 11, 2003. The deadline for filing complaints objecting to discharge or to determine dischargeability of a particular debt was August 4, 2003. On June 23, 2003, prior to the deadline, Plaintiff filed a timely complaint seeking to deny Debtor's discharge under 11 U.S.C. § 727 (Count I) and a determination that Debtor's debt to Plaintiff, as evidenced by the state court judgment, was not dischargeable under 11 U.S.C. § 523(a)(2)(A) (Count II).

5. Count I, Paragraph 5 of the Complaint alleged that "Defendant fraudulently represented that he had the proper bond and insurance coverage in order to obtain contracts for construction and rehabilitation." Paragraph 6 alleged that "In fact he did not have the proper bond and insurance and he obtained contracts improperly and through deception." Paragraph 9 alleged that Plaintiff paid Debtor Defendant $21,000, and Debtor failed to "…explain the loss of this potential asset of the estate." Count I specifically mentioned subsections § 727(a)(4) and (5) as statutory grounds for denial of Debtor's discharge.

6. In Count II, Paragraph 5 alleged: "A critical representation that induced the Plaintiff to enter into the agreement with the Defendant was that the Defendant was insured and bonded." Paragraph 6 of Count II alleged: "In fact the Defendant did not have the insurance and bond he represented." Count II further alleges that the Debtor Defendant requested payment of $21,000 from Plaintiff in order to purchase materials for the renovation project but in fact did not purchase those materials with Plaintiff's money. Plaintiff alleged that Debtor's promise to purchase materials was false and made with an intent to deceive Plaintiff. Count II requested that Debtor's particular debt to Plaintiff be held non-dischargeable under § 523(a)(2)(A).

7. On September 18, 2003, a default judgment was entered against the Debtor, which was later vacated on September 26, 2003. Shortly thereafter, on September 29, 2003, Debtor filed an answer to the Complaint.

8. Debtor's answer denied that he fraudulently represented that he had the proper bond and insurance coverage in order to obtain contracts for construction and rehabilitation and denied that he in fact did not have the proper bond and insurance coverage and obtained contracts improperly and through deception. *See* Answer and Affirmative Defenses of Defendant Christopher Lynn Dameron, Adversary Docket No. 15, paragraphs 5 and 6 of Counts I and II.

9. Pursuant to leave of court, Plaintiff filed an amended complaint on November 18, 2004, adding an additional count seeking to deny debtor's discharge under 11 U.S.C. § 727(a)(4)(A). Plaintiff alleged that Debtor made numerous false oaths in connection with the case, including false statements during the first meeting of creditors and false

statements in pleadings. This new count was designated Count II and the original Count II cause of action alleged under section 523 of the Code in the first complaint was re-designated as Count III of the Amended Complaint. Although the new Count II referred to § 727(a)(4)(A) as a basis for denial of Debtor's discharge, Plaintiff's original complaint also requested relief under this section in the concluding "wherefore" clause of Count I.

10. On or about March 14, 2002, Debtor gave a letter to plaintiff's condominium association indicating that he would do the work in accordance with the "Appendix B Construction Guidelines and Specifications." Page 25 of those specifications provided in part that "*Prior to beginning work*, all contractors doing work in the building must present a certificate of insurance to the Board of Directors or its authorized representative …" (Emphasis added). Plaintiff's Exhibit F. Debtor received the work specifications, including page 25, prior to commencing work on Plaintiff's condominium.

11. Debtor told Plaintiff he would do what was necessary to get approval for the remodeling project by the condominium board or association.

12. Debtor admitted that he was informed by the condominium association governing plaintiff's unit that Debtor could not do any construction or remodeling work on Plaintiff's unit without first providing proof of insurance. *See* Debtor deposition transcript, Plaintiff's Exhibit R, p. 75, 80-81.

13. Nevertheless, Debtor stated under oath in his earlier filed Second Supplemental Responses to Plaintiff's Discovery Requests that he was not aware of any insurance requirement by the condominium association. Interrogatory Answer 6, Plaintiff's Exhibit U.

14. Debtor further admitted at trial that he altered an old insurance certificate to make it appear that he had insurance coverage in place and submitted this forged certificate to Plaintiff's condominium association. At the time he presented the false insurance certificate to the association, Debtor had no insurance and made no attempt to obtain insurance at any time while working on Plaintiff's unit.

15. Debtor's willingness to admit that he in fact did not have insurance came very late in this proceeding. Debtor's answers to the original and amended complaints continued to deny that he falsified the insurance certificate and, significantly, even denied that he was without the proper insurance at the time of his work on Plaintiff's unit. *See* Answer and Affirmative Defenses of Defendant Christopher Lynn Dameron to Plaintiff's Amended Complaint, Count I paragraphs 5 and 6, and Count II, answers to paragraphs 1-3.

16. Debtor's responses to Plaintiff's allegations regarding lack of insurance were falsely pled in his answers filed in this bankruptcy case. It appears that Debtor belatedly acknowledged altering the insurance certificate in his deposition, taken shortly before trial, only because Plaintiff produced documentation from the insurance company denying that there was any coverage in place and denying the legitimacy of the "doctored" insurance certificate, which came from Debtor's wife's fax machine. *See* Debtor deposition transcript, Plaintiff's Exhibit R, pp. 61-62 and Plaintiff's Exhibit J, page 2-3.

17. Plaintiff did not discover Debtor's fraudulent alteration of the insurance certificate until after he obtained his contract judgment against Debtor in state court.

18. Absent Debtor's false representations regarding insurance coverage, Debtor would not have been able to work on Plaintiff's unit.

19. Plaintiff would not have paid Debtor any money if Debtor was prohibited by the condominium association from working on the unit.

20. During Debtor's meeting of creditors, pursuant to § 341 of the Bankruptcy Code, Debtor falsely testified under oath that the kitchen cabinets he purchased for Plaintiff's job were later sold for $2000.00. He did not qualify this statement during the creditor's meeting, and later admitted at trial that most of these cabinets (over fifty percent) were installed in his father-in-law's house, where Debtor lived. Transcript of § 341 meeting, Plaintiff's Exhibit B, pp. 11-12. At trial, Debtor testified he sold *some* of the cabinets for $2000 but could not remember who he sold them to. Debtor's testimony regarding the sale of any portion of the cabinets was not credible and he lied during the creditor's meeting under oath when he stated he sold the cabinets, misleading the Trustee and Plaintiff by not informing them that most of the cabinets were not sold but instead installed in his residence.

21. Again, Debtor's admission regarding the cabinets came only after confronted with documents from the cabinet seller, Mr. Deeke, that Debtor purchased small fill in pieces in order to fit the cabinets in his residence. Debtor provided none of this information to the Trustee or Plaintiff until he was "caught" by virtue of Plaintiff's discovery efforts directed to third parties like Mr. Deeke and the insurance company.

22. Debtor's schedules and answers to written discovery denied that other parties owed him any money. This was false. It was established that Debtor claimed Mike Sinde owed him $2000 for work the Debtor had done for him, and that Roman Builders

owed him nearly $4000 for another job the Debtor performed in 1999. Even though Debtor attempted to collect these debts, including filing a mechanics' lien in one instance, he did not disclose these receivables in his bankruptcy until the debts were identified through Plaintiff's discovery.

23. There were other misrepresentations made by the Debtor in his schedules, answers to discovery, and testimony. Nevertheless, the false statements outlined above are material and sufficient enough to deny Debtor the relief he seeks in his bankruptcy.

Legal Discussion

Section 523-Dischargeability

Count III of the Amended Complaint presents the easiest question. The relevant part of 11 U.S.C. § 523(a)(2)(A) provides:

> (a) A discharge under section 727 … of this title does not discharge an individual debtor from any debt-
>
> > (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
> >
> > > (A) false pretenses, a false representation, or actual fraud, …

Here, Plaintiff agreed to employ Debtor on the condition that Debtor could meet the requirements established by the Plaintiff's condominium board or association rules. Debtor represented to Plaintiff that he met those conditions or would do what was necessary to meet them. Debtor knew that insurance was required and he did not have it. Hence, to obtain the money from Plaintiff for the job, and to commence the remodeling, Debtor admittedly falsified an insurance certificate. The recent case of Sinha vs. Clark, 330 B.R. 702 (Bankr. C.D. Ill. 2005) is similar to the fact pattern present here. Debtor

Clark, a home improvement contractor, advertised that he was licensed and insured. At the time of this advertisement, Clark knew those representations were false. Clark presented an insurance certificate to the homeowners, the Sinhas, knowing that he had purchased the insurance with a bad check and that the certificate would be cancelled. Clark took $20,000 from the Sinhas to purchase materials but did not do so. He commenced demolition in the home to make it appear he was going to do the job. Ultimately, the Sinhas obtained a default judgment against Clark. The bankruptcy court ruled in favor of the Sinhas, finding the debt non-dischargeable under Sections 523(a)(2)(A) and 523(a)(6), the latter of which denies discharge of a debt arising from willful and malicious injury by the debtor to another.

In this case, the Debtor lied about insurance coverage to get the job with Plaintiff and continued to lie about it during this bankruptcy proceeding until confronted with incriminating documents. Debtor ultimately admitted he knew insurance coverage was required; he did not have coverage, and falsified an insurance certificate to get the job started. He never sought to obtain insurance at any point in time even though he knew he was supposed to have it. This establishes a clear intent to defraud Plaintiff.

Debtor believes that to the extent he did not make a specific false representation to Plaintiff regarding insurance coverage, Plaintiff cannot state a case under § 523(a)(2)(A), because there is no false representation to Plaintiff that Plaintiff could rely on. Debtor's legal argument is flawed. First, the evidence presented demonstrated that Debtor did make the false representation to Plaintiff that he was either currently qualified to do the remodeling work according to the condominium association's work rules, or he would become qualified prior to the work commencing. Debtor was presented with the

work rules requiring insurance. Debtor knew he did not have coverage so he forged a document to deceive the condominium association that he had insurance. Forging qualifications is not a reasonable interpretation of Debtor's statements to Plaintiff that he will do what he needs to do to become qualified.

Second, and more importantly, § 523(a)(2)(A) is not limited to misrepresentations, let alone misrepresentations made by Debtor to a particular person such as the Plaintiff, as opposed to the condominium association. It precludes discharge of debts obtained through actual fraud, which need not involve a misrepresentation at all. In McClellan v. Cantrell, 217 F. 3rd 890, 893 (7th Cir. 2000) Judge Posner observed:

> But section 523(a)(2)(A) is not limited to "fraudulent misrepresentation." Although Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 472-74, 51 L. Ed. 2d 480, 97 S. Ct. 1292 (1977), held that the concept of fraud in the SEC's Rule 10b-5 is limited to misrepresentation and therefore did not reach the nonrepresentational breach of fiduciary duty--a squeeze out of minority shareholders--charged in that case, there are no such holdings with regard to the concept of "actual fraud" in 11 U.S.C. § 523(a)(2)(A). There could not be; for by distinguishing between "a false representation" and "actual fraud," the statute makes clear that actual fraud is broader than misrepresentation. Collier's treatise, while assuming along with the cases that we have cited that "actual fraud" involves a misrepresentation, defines the term much more broadly--as "any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another," 4 Collier on Bankruptcy para. 523.08[1][e], p. 523-45 (15th ed., Lawrence P. King ed., 2000)--which is a good description of what the debtor is alleged to have done here. . . .
>
> No learned inquiry into the history of fraud is necessary to establish that it is not limited to misrepresentations and misleading omissions. "Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth. No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated." Stapleton v. Holt, 207 Okla. 443, 250 P.2d 451, 453-54 (Okla. 1952).

The elements of actual fraud are that: (1) a fraud occurred; (2) the debtor was guilty of intent to defraud; and (3) the fraud created the debt that is the subject of the complaint. In re Jairath, 259 B.R. 308, 314 (Bankr. N.D. Ill. 2001). Debtor committed fraud when he falsified the insurance certificate. He furthered that scheme when he took Plaintiff's money, purchased cabinets, and later installed them in his own residence, while lying about it to the Trustee and Plaintiff. As described above, Debtor had a clear intent to defraud Plaintiff since he never sought to obtain insurance at any point in time even though he knew he was supposed to have it. Finally, that fraud created the debt owed to Plaintiff; absent Debtor's fraudulent conduct he would never have been able to obtain the money from Plaintiff for the job, and to commence the remodeling.

For these reasons, the debt resulting from Debtor's attempt to remodel Plaintiff's condominium is non-dischargeable and judgment is entered in Plaintiff's favor and against Debtor on Count III of the Complaint. Plaintiff may proceed under state law to collect his judgment against Debtor.

Section 727 – Objection to Discharge

I. Debtor's Motion in Limine is Denied Since Count II is Not Time Barred

Additionally, Plaintiff seeks to deny Debtor a discharge of all his debts. Count I of the original complaint sought to bar Debtor's discharge under both § 727(a)(4) and (a)(5) of the bankruptcy code.[1] Sections 727(a)(4) and (5) provide in part:

> (a) The court shall grant the debtor a discharge, unless---
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case—
>
> (A) made a false oath or account;
> …..or

[1] See "Wherefore" clause in original complaint which pled both theories.

> (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;
>
> (5) 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;…

It is clear the original complaint put Debtor on notice that Plaintiff sought to bar Debtor's discharge on two theories: (1) Debtor made a false oath in connection with the bankruptcy case and (2) Debtor failed to explain or account for the loss of certain assets. The original complaint contained some facts to support both these theories. Count I, paragraphs 5 and 6 alleged Debtor fraudulently misrepresented that he had the proper bond and insurance coverage. This is sufficient alone to state a claim under § 727(a)(4)(A), since Debtor repeated these misrepresentations in documents filed before this court in connection with this bankruptcy. Count I also alleged that Debtor failed to properly explain the loss of the money paid to Debtor by Plaintiff, including concealing that Debtor used Plaintiff's money not for Plaintiff's remodeling job, but for Debtor's own personal use.

After a prolonged period of attempting to extract discovery from the Debtor, but well in advance of the trial on this matter, on or about November 18, 2004, over objection of the Debtor, this court granted Plaintiff leave to amend his complaint. In reviewing the Amended Complaint, this court found that it did not unfairly surprise Debtor. The legal theories did not change and only additional facts were added to support the theories pled in the original complaint. Although Plaintiff was earlier aware of some of the facts added in the amendments, many were not known to Plaintiff until after completion of discovery in this case. After allowing the amendments, the court extended discovery at the request

of Plaintiff. The record does not indicate that Debtor sought to extend discovery after the filing of the amended complaint, although additional discovery did take place between the parties. The trial on this matter did not occur until approximately six months after the filing of the amended complaint. Hence, Debtor had more than a sufficient opportunity to prepare for the facts added in the amended complaint, which were simply cumulative of what already established Plaintiff's claims in the original complaint.

Nevertheless, Debtor argues that Count II was time barred under Bankruptcy Rule 4004(a). That rule provides in part:

> In a chapter 7 liquidation case *a complaint* objecting to the debtor's discharge under §727(a) of the Code shall be filed no later than 60 days set for the meeting of creditors under 341(a).
>
> (Emphasis added).

Plaintiff satisfied the condition of Rule 4004(a) when he timely filed Count I of his original complaint, specifically requesting relief under § 727(a)(4), which later became Count II in the Amended Complaint. Debtor's tortured construction of Rule 4004(a)---namely: all *facts* supporting the complaint objecting to discharge must be identified and stated in the complaint within 60 days of the first meeting of creditors-- is in no way supported under the plain meaning of this rule. Obviously, discovery can lead to additional facts to support the original §727(a) complaint, and that is partly what happened here. That Plaintiff knew some of the facts earlier than the time of amendment is not an exception carved out of Rule 4004(a)'s simple directive that the complaint must be brought within 60 days of the creditor's meeting.

Indeed, the rules permit amendments to the pleadings to conform to the facts developed, even after trial. Fed. R. Civ. P. 15(b), made applicable by Fed. R. Bankr. P. 7015 states:

> **(b) Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. *If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits.* The court may grant a continuance to enable the objecting party to meet such evidence.
>
> (Emphasis added)

In this case, Debtor was alerted to the additional facts Plaintiff sought to prove in support of his Complaint well in advance of trial. Since Rule 4004(a) was satisfied by Plaintiff's original timely filed complaint, and because Debtor had plenty of opportunity to develop his defense to the additional facts, Debtor's motion to bar any evidence relating to matters alleged in Count II is denied and the court will consider the evidence presented at trial in support of Plaintiff's Counts I and II.

In a related context, this court rejects Debtor's attempt to apply "judicial estoppel" to bar Plaintiff from arguing any misconduct by Debtor beyond breach of contract. Debtor maintains that because Plaintiff sought a state court judgment for breach of contract only, he is precluded in this proceeding from arguing fraud. Debtor's own case law establishes that he is wrong. Among other things, the differing positions taken by Plaintiff must be totally inconsistent to invoke judicial estoppel. Dailey v. Smith, 292

Ill. App. 3d 22, 28, 684 N.E. 2nd 991, 995 (Ill. App. Ct. 1997). Arguing breach of contract, and later finding out that Debtor committed fraud to get the contract, is not inconsistent. Debtor incorrectly asserts that Plaintiff desires to avoid the contract in this proceeding. No, Plaintiff wants to bar Debtor's discharge. Furthermore, most all of the fraud involved here (false oaths in bankruptcy) occurred after the judgment in state court, or was discovered shortly after or around the time the default judgment was entered (forgery of insurance certificate).

II. Debtor's Discharge Is Denied Under § 727(a) of the Bankruptcy Code

Section 727 is strictly construed against the objecting creditor and liberally in favor of the debtor, in order to protect the debtor's fresh start. In re Sapru, 127 B.R. 306, 314 (Bankr. E.D.N.Y. 1991). See also Fed. R. Bankr. P. 4005 ("At the trial on a complaint objecting to discharge, the plaintiff has the burden of proving the objection."). "Although the burden of proof rests on the creditor at all times, the debtor cannot prevail if he is unable to offer credible evidence after the plaintiff has established a prima facie case." In re Costello, 299 B.R. 882 (Bankr. N.D. Ill. 2003).

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) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with the intent to deceive; and (5) the statement related materially to the bankruptcy case. In re Self, 325 B.R. 224, 245 (Bankr. N.D. Ill. 2005); In re Bailey, 147 B.R. 157, 162 (Bankr. N.D. Ill. 1992). A debtor's petition, schedules, statement of financial affairs and statements made at a § 341 meeting are all statements under oath for purposes of § 727(a)(4). Self, 325 B.R. at 245. Whether a

debtor made a false oath within the meaning of § 727(a)(4)(A) is a question of fact. A false oath may include a knowing and fraudulent omission. It is a debtor's role to carefully consider the questions posed and answer them accurately and completely. Self, 325 B.R. at 245-246 (citations omitted). Debtor failed to do that throughout this case--commencing with his schedules and statement of financial affairs, during the creditor's meeting, in pleadings and answers to discovery and while testifying at trial.

Debtor falsely testified at the creditor's meeting and during trial that he sold the cabinets purchased for Plaintiff's job, when in fact most of them were installed in his residence. He did not disclose his receivables from other jobs in his schedules and/or statement of financial affairs. Moreover, Debtor stated under oath in his earlier filed Second Supplemental Responses to Plaintiff's Discovery Requests that he was not aware of any insurance requirement by the condominium association when the evidence demonstrates he was "aware" enough to forge an insurance certificate. Finally, both of Debtor's answers to the insurance allegations in the complaints filed in this case were false.

"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. 2nd 616, 618 (11th Cir. 1984). Concealing information about the cabinets and accounts receivable directly obstructs a trustee from doing his or her job in collecting estate assets and is material to the administration of this case. Finally, the Debtor's numerous false statements regarding insurance coverage, asserted in

this proceeding and before the bankruptcy, misrepresented his business transactions and unduly prolonged this case while Plaintiff dug out the truth.

To find the requisite degree of fraudulent intent, the court must find that Debtor knowingly intended to defraud or displayed a reckless disregard for the truth. Matter of Yonikus, 974 F.2d 901, 905 (7th Cir. 1992). Direct evidence of intent to defraud may not be available. Costello, 299 B.R. at 900. As a result, the requisite intent under § 727(a)(4)(A) may be inferred from circumstantial evidence or by inferences based on a course of conduct. Yonikus, 974 F.2d at 905. Reckless disregard means "not caring whether some representation is true or false . . . [and] is, at least for purposes of the provisions of the Bankruptcy Code governing discharge, the equivalent of knowing that the representation is false and material." In re Chavin, 150 F. 3rd 726, 728 (7th Cir. 1998). Taking the record as a whole, reviewing trial exhibits and considering the credibility of Debtor's testimony, Debtor intended to mislead the participants in this bankruptcy and the court thus finds sufficient scienter to justify barring the Debtor's discharge under § 727(a).

The Plaintiff proved his case under both § 727(a)(4), relating to false oaths, and § 727(a)(5), failure to explain the loss of estate assets. Lying about the cabinets and other job receivables is sufficient to meet the requirements of § 727(a)(5) as well as (a)(4). Indeed, although Debtor said he sold the cabinets for $2000, he could not explain who he sold them to or produce any evidence of that sale.

Finally, while not raised specifically in Plaintiff's Complaint, nor necessary to rely on given Plaintiff's success in meeting his burden on two other subsections of § 727(a), it is appropriate to bar Debtor's discharge under § 727(a)(3) which states:

(a) The court shall grant the debtor a discharge, unless—

(3) 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;

(Emphasis added)

Debtor argues that discharge should not be barred under this subsection since Plaintiff did not plead this particular legal theory. "This argument misses an essential point about federal procedure: parties are not required to plead legal theories." Disch v. Rasmussen, 417 F. 3rd 769, 775-776 (7th Cir. 2005) (citation omitted). Debtor clearly concealed and falsified his business transactions by forging the insurance certificate. The concealment continued late into this case until Plaintiff's discovery efforts left Debtor no alternative but to admit the truth. Debtor's conduct falls within the precise wording of the statute, notwithstanding Debtor's assertions that the subsection has never been applied in this context.

Conclusion

The Bankruptcy Code was meant to discharge only an honest debtor from his or her debts. Matter of Garman, 643 F.2d 1252, 1257 (7th Cir. 1980), *cert. denied*, 450 U.S. 910, 101 S. Ct. 1347, 67 L. Ed. 2d 333 (1981). Judgment is entered in favor of Plaintiff on all counts of the Amended Complaint.

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PAMELA S. HOLLIS
United States Bankruptcy Judge