United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions for Posting

Will this opinion be Published? No

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

Bankruptcy No. 98 B 40900

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

Adversary No. 99 A 0427

Date of Issuance: June 15, 2000

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff: Terence M. Fenelon, Esq., 445 West Jackson, Suite 107, Naperville, IL 60540

Attorney for Debtors/Defendants: Brenda Porter Helms, Esq., 124C South County Farm Road, Wheaton, IL 60187

Trustee: Gina B. Krol, Esq., Cohen & Krol, 105 West Adams Street, Suite 3100, Chicago, IL 60603

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

MEMORANDUM OPINION

This matter comes before the Court on the complaint filed by Richard Divelbiss (the "Creditor") objecting to the discharge of Daniel and Rebecca Maida (the "Debtors") pursuant to 11 U.S.C. §§ 727(a)(2)(A), (a)(4)(A) and (a)(5). For the reasons set forth herein, the Court hereby grants judgment, in part, in favor of the Creditor. The Debtors' discharge is denied and the objection thereto under § 727(a)(4)(A) is sustained. The objections under § 727(a)(2)(A) and § 727(a)(5) are overruled.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern

District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(J).

II. FACTS AND BACKGROUND

The Debtors filed a Chapter 7 petition on December 21, 1998. The Creditor and one of the Debtors, Rebecca, were engaged in protracted pre-petition domestic relations litigation in the state court. The Creditor was formerly married to Rebecca. For some years, she has operated a day care service out of her home. She is licensed by the Illinois Department of Children and Family Services. She watches from one to five children including her sons, and has long been involved in day care, including the period while she was married to the Creditor. She keeps no conventional or formal records of her weekly income and expenses, just receipts which are collected in boxes and turned over to her husband, Daniel, who in turn gives them to the accountant to sort through and use in connection with preparation and filing of the Debtors' income tax returns. Rebecca does not keep a formal ledger book or daily journal in connection with her day care operations. She has parents of the children provide her a statement at the end of the year for the amounts they have paid her for the calendar year. The other Debtor, Daniel, is a police officer. He has contracted cancer and his medical bills and lost income, among other things, precipitated the filing of their bankruptcy.

The Creditor filed this adversary proceeding on April 5, 1999. He alleges in a twelve-count pro se complaint that the Debtors' discharge should be denied pursuant to 11 U.S.C. §§ 727(a)(2)(A), (a)(4)(A) and (a)(5).[1] At the time of trial, when he obtained counsel,

---

[1] The Creditor, in his Proposed Findings of Fact and Conclusions of Law, alleges that the Debtors violated 11 U.S.C. § 727(a)(3). The complaint does not seek relief under this statutory section. Moreover, the Joint Pretrial Statement filed in this matter does not make reference to § 727(a)(3). Because the Creditor did not seek to amend the complaint pursuant

the Creditor withdrew Counts VII, VIII and IV of the complaint, and, in closing arguments, did not pursue Count XII. Thus, the Court will not further address these counts.

III. APPLICABLE STANDARDS FOR OBJECTIONS TO DISCHARGE

The discharge provided by the Bankruptcy Code is to effectuate the "fresh start" goal of bankruptcy relief. In exchange for that fresh start, the Bankruptcy Code requires debtors to accurately and truthfully present themselves before the Court. A discharge is only for the honest debtor. In re Garman, 643 F.2d 1252, 1257 (7th Cir. 1980), cert. denied, 450 U.S. 910 (1981). Consequently, objections to discharge under 11 U.S.C. § 727 should be liberally construed in favor of debtors and strictly against objectors in order to grant debtors a fresh start. Soft Sheen Prods., Inc. v. Johnson (In re Johnson), 98 B.R. 359, 364 (Bankr. N.D. Ill. 1988) (citation omitted). Because denial of discharge is so drastic a remedy, courts may be more reluctant to impose it than to find a particular debt nondischargeable. See Johnson, 98 B.R. at 367 ("The denial of discharge is a harsh remedy to be reserved for a truly pernicious debtor.") (citation omitted). The plaintiff has the burden of proving the objection. See Fed. R. Bankr. P. 4005; In re Martin, 698 F.2d 883, 887 (7th Cir. 1983) (the ultimate burden of proof in a proceeding objecting to a discharge lies with the plaintiff). The objector must establish all elements by a preponderance of the evidence. In re Scott, 172 F.3d 959, 966-67

---

to Federal Rule of Bankruptcy Procedure 7015, which incorporates by reference Federal Rule of Civil Procedure 15, no cause of action has been properly pleaded pursuant to that section and relief thereunder would be inappropriate. Moreover, there was no express of implied consent of the parties to try an objection to discharge under § 727(a)(3) pursuant to Rule 15(b). Accordingly, the Court will not further address any of the arguments raised on that ground.

(7th Cir. 1999).

IV. DISCUSSION

A. 11 U.S.C. § 727(a)(2)(A)

Pursuant to 11 U.S.C. § 727(a)(2)(A), the Court will grant the Debtors a discharge unless the Creditor can prove by a preponderance of the evidence that the Debtors:

> (2) 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. . . .

11 U.S.C. § 727(a)(2)(A).

Denial of discharge under this section requires proof of actual intent to hinder, delay or defraud a creditor. In re Snyder, 152 F.3d 596, 601 (7th Cir. 1998); In re Krehl, 86 F.3d 737, 743 (7th Cir. 1996); In re Smiley, 864 F.2d 562, 566 (7th Cir. 1989). "[P]roof of harm is not a required element of a cause of action under Section 727." Id. at 569. In determining whether the Debtors have acted with intent to defraud under § 727, the Court should consider the Debtors' "whole pattern of conduct." See Bennett & Kahnweiler Assocs. v. Ratner (In re Ratner), 132 B.R. 728, 731 (N.D. Ill. 1991) (quoting In re Reed, 700 F.2d 986 (5th Cir. 1983)). The issue of a debtor's intent is a question of fact to be determined by the

bankruptcy judge. See Smiley, 864 F.2d at 566.

Actual fraudulent intent can be inferred from extrinsic evidence. Id.; Krehl, 86 F.3d at 743; Filmar, Inc. v. White (In re White), 63 B.R. 742, 744 (Bankr. N.D. Ill. 1986) ("a debtor is unlikely to directly testify that his intent was fraudulent, the court may deduce fraudulent intent from all the facts and circumstances of a case"). "Thus, where the evidence on the intent question is such that two permissible conclusions may rationally be drawn, the bankruptcy court's choice between them will not be viewed as clearly erroneous." Krehl, 86 F.3d at 744 (citation omitted). "Intent to defraud involves a material representation that you know to be false, or, what amounts to the same thing, an omission that you know will create an erroneous impression." In re Chavin, 150 F.3d 726, 728 (7th Cir. 1998) (citations omitted).

The Creditor contends in Count I of the complaint that six months prior to the filing of the bankruptcy petition, the Debtors transferred and concealed certain funds in the form of cash withdrawals from the credit union account on August 3, 5, and 17, 1998 in the sums of $6,000.00, $1,000.00 and $4,000.000, respectively, after receiving a large property settlement of $22,128.92 in July, 1998 from the Creditor pursuant to the state court marital dissolution proceeding. The Creditor contends that these cash withdrawals were payoffs to insiders and/or attempts to conceal assets. In addition, in Count II of the complaint, the Creditor alleges that the Debtors, subsequent to receiving the settlement sum from the marital dissolution proceeding, transferred and concealed certain funds in the form of drafts or checks to allegedly undisclosed recipients. In Counts III and IV, the Creditor argues that the Debtors failed to keep or preserve books or records from which their financial condition and

business transactions might be ascertained. The Creditor argues that the day care business operations generated income in excess of $30,000.00 in 1996, but Rebecca failed to maintain records for this business.[2] Furthermore, in Count X of the complaint, the Creditor alleges that the Debtors gave false testimony to the Trustee in regards to a pension plan transfer.

The Court finds that the Creditor has failed to prove the requisite elements under § 727(a)(2)(A) with respect to these transactions. Although the credit union account records were less than crystal clear and were not complete, the Court is unable to find that the Debtors were concealing assets or attempting to defraud anyone. See Debtors' Exhibit Nos. 1-3 and Creditor's Exhibit Nos. 1 and 2. Rather, they were impecunious and unwise in some of their expenditures by obvious hindsight. The Creditor has failed to prove actual fraudulent intent on the part of the Debtors. Moreover, based on the documentary and testimonial evidence, the Court will not infer fraudulent intent. For purposes of Count II, the Debtors adequately explained who received the eighteen checks totaling $9,302.37 that they had written between July 30, 1998 and August 24, 1998. See Debtors' Exhibit No. 10. Further, the Debtors testified that they withdrew $1,000.00 cash for a three-day vacation to Wisconsin. Moreover, the Debtors produced two receipts for repairs on an automobile and their home in the amounts of $1,459.72 and $2,262.29, respectively. See Debtors' Exhibit Nos. 4 and 5. Further, Neal Cerne, Rebecca's counsel in the marital dissolution proceeding, corroborated the Debtors' testimony that they paid for court reporter and transcript fees in

---

[2] The failure to maintain records falls under § 727(a)(3). As the Court previously noted, however, the Creditor has not properly pleaded a cause of action under § 727(a)(3). Hence, the Court will not address the argument as any relief thereunder would be inappropriate in light of the Debtors' objection.

connection with an appeal in the dissolution proceeding. In addition, Rebecca testified that she used the money to pay credit card debt and other bills.

The Creditor offered no persuasive evidence to rebut the evidence presented by the Debtors that the money was spent other than as the Debtors suggested. Implicit in the Creditor's argument regarding the Debtors' assets seems to be the suggestion that the Debtors spent their money in a manner that the Creditor views imprudent in light of their financial situation. The mere fact that the Debtors may have, in the Creditor's view, made imprudent choices in spending their money does not equate with fraud. Clearly, the Creditor is upset by the way in which the money he paid his former spouse was spent. That, however, is not the functional equivalent of fraud. Daniel has cancer and cannot work overtime. His medical bills and lost income exacerbated the financial crunch that began in 1998, which led to the bankruptcy filing.

Further, the Court finds that the Debtors have not transferred, removed, destroyed, mutilated or concealed assets. Rather, they have failed to explain with absolute arithmetic precision how they spent all of the money received from the Creditor. The credit union account statements and the Debtors' testimony showed where most of the money went. The Debtors maintained a joint checking/savings account at a credit union from which copies of various monthly account statements for a substantial period and some related documentary evidence was introduced at trial. See Debtors' Exhibit Nos. 1-3 and Creditor's Exhibit Nos. 1 and 2. According to the Debtors, they do not receive their canceled checks from the credit union with their monthly statements. That they did not produce copies of such checks is not fatal to their defense inasmuch as the Creditor could have, but did not, subpoena such items

from the credit union. Therefore, the Court overrules the Creditor's objection to the Debtors' discharge under § 727(a)(2)(A).

B. 11 U.S.C. § 727(a)(4)(A)

The Creditor alleges in Counts III, IV, V and VI of the complaint that the Debtors violated § 727(a)(4)(A) in that they have given false written statements by claiming business expenses as their individual expenses. The Creditor argues that their unaccounted intermingling of their business and personal records demonstrates a reckless disregard for the detail and accuracy required in answering the questions on the Schedules and Statement of Affairs. In Count X of the complaint, the Creditor alleges that the Debtors gave false testimony to the Trustee with regards to a pension plan transfer. Further, in Count XI, the Creditor contends that the Debtors made false declarations on their Schedule B when they listed household furnishings at $800.00.

Section 727(a)(4)(A) provides:

> (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.

11 U.S.C. § 727(a)(4)(A). The purpose of § 727(a)(4) is to enforce the Debtors' duty of disclosure and to ensure that the Debtors provides reliable information to those who have an interest in the administration of the estate. See Brandt v. Carlson (In re Carlson), 231 B.R. 640, 655 (Bankr. N.D. Ill. 1999); Bensenville Community Center Union v. Bailey (In re Bailey), 147 B.R. 157, 163 (Bankr. N.D. Ill. 1992) (citations omitted).

In order to prevail, the Creditor must establish five elements under § 727(a)(4)(A):

(1) the Debtors made a statement under oath; (2) the statement was false; (3) the Debtors knew the statement was false; (4) the Debtors made the statement with the intent to deceive; and (5) the statement related materially to the bankruptcy case. Bailey, 147 B.R. at 162 (citations omitted). If made with the requisite fraudulent intent, a false statement, whether made in the schedules or orally at a § 341 creditors' meeting is sufficient grounds for denying a discharge provided it was knowingly made and is material. Armstrong v. Lunday (In re Lunday), 100 B.R. 502, 508 (Bankr. D. N.D. 1989). It is a debtor's role to consider the questions posed on the schedules and at the creditors' meeting carefully, and answer them accurately and completely. Id.

In In re Yonikus, 974 F.2d 901 (7th Cir. 1992), the Seventh Circuit held that a debtor's failure to list a pre-petition personal injury and worker's compensation claim on his schedules constituted grounds for revocation of the debtor's discharge (the Yonikus trustee sought to revoke debtor's discharge under 11 U.S.C. § 727(d)(2), the post-discharge equivalent to § 727(a)(4)(A)). In rejecting the debtor's argument that the worker's compensation award was exempt and the personal injury claim was property of his employer and not him, the court stated, "[d]ebtors have an absolute duty to report whatever interests they hold in property, even if they believe their assets are worthless or are unavailable to the bankruptcy estate." Id. at 904 (citations omitted).

Turning to the matter at bar, the Creditor first must establish that the Debtors made a statement under oath. A debtor's petition and schedules constitute a statement under oath for purposes of a discharge objection under § 727(a)(4). See Nof v. Gannon (In re Gannon), 173 B.R. 313, 320 (Bankr. S.D. N.Y. 1994) (citations omitted). The Schedules and

Statement of Financial Affairs filed by the Debtors constitute statements under oath. Hence, there is no dispute that this element has been met.

Second, the Creditor must show that such statements were false. Whether the Debtors made a false oath within the meaning of § 727(a)(4)(A) is a question of fact. Williamson v. Fireman's Fund Ins. Co., 828 F.2d 249, 251 (4th Cir. 1987); Continental Ill. Nat. Bank & Trust Co. of Chicago v. Bernard (In re Bernard), 99 B.R. 563, 570 (Bankr. S.D. N.Y. 1989) (citing Williamson). "Filing of false schedules with material omissions or misrepresentations with an intent to mislead creditors and the trustee as to a debtor's actual financial condition constitutes a false oath under section 727(a)(4)(A)." Britton Motor Serv., Inc. v. Krich (In re Krich), 97 B.R. 919, 923 (Bankr. N.D. Ill. 1988) (citation omitted). Subsequent voluntary disclosure through testimony or amendment to the schedules does not expunge the falsity of the oath. Bailey, 147 B.R. at 165 (citation omitted).

The Debtors testified that they own a home computer for the use of the day care business, which was undisputedly not listed on the Schedules. Further, the evidence was undisputed that within the relevant period pre-petition, the Debtors transferred $1,550.00 to Rebecca's brother, Brad Dunlap, and $550.00 to Rebecca's sister, Sheila Vanderspool. Neither of these transfers to insiders was ever disclosed on the Statement of Affairs.

While the Court does not expect every individual item of clothing or piece of furniture to be scheduled and valued, or that each scheduled liability be listed with absolute arithmetic precision, there comes a point when the aggregate errors and omissions cross the line past which a debtor's discharge should be denied. See Netherton v. Baker (In re Baker), 205 B.R. 125, 133 (Bankr. N.D. Ill. 1997) (debtor's failure to disclose his tropical fish hobby

and its assets, including 100 fish tanks, constituted grounds for denial of his discharge); A.V. Reilly Int'l, Ltd. v. Rosenzweig (In re Rosenzweig), 237 B.R. 453, 457 (Bankr. N.D. Ill. 1999) (debtor's failure to disclose an income tax refund and a second computer constituted grounds for denial of his discharge). Wherever that fine and elusive line is, the Court is of the view it has been crossed here. The Court can understand there may be an occasionally innocently omitted deminimus transfer by way of gift to a family member or friend. The omission of a home computer and transfers amounting to thousands of dollars to insider family members from the original and amended Schedules and Statement of Affairs, however, is simply too substantial to overlook or attribute to mere negligence or simple inadvertence on the part of the Debtors. The Court finds that the Schedules and the Statement of Affairs were incomplete and failed to disclose any pre-petition transfers to any insider as well as the home computer. Thus, the Creditor has established this element regarding the computer and insider transfers.

The Creditor further contends that the Debtors failed to list certain assets and income. Kent Gaertner, the attorney who represented the Debtors in connection with their bankruptcy case, testified that his office prepared the Schedules and Statement of Affairs from the information supplied by the Debtors. Prior to the 11 U.S.C. § 341 meeting, he and the Debtors realized that the original Schedule I was incorrect. Subsequently, the Debtors filed an amended Schedule I. See Creditor's Exhibit No. 11. Schedule I, however, only relates to the current income of the Debtors. The amended Schedule C references some pension assets as well as a pistol which were not referenced on the original Schedule C. See Creditor's Exhibit No. 11. Additionally, Schedule I was corrected to show Rebecca's correct

payroll, Daniel's increased income to cover his extra pay as a police officer, and Rebecca's increased net income from her day care operation. Id. According to Gaertner, Rebecca advised him of the inaccuracies in the original Schedule I, and the parties immediately advised the Trustee. Based on this testimony, the Court finds that the Debtors did not make false statements on Schedules C or I. They corrected those inaccuracies as soon as they became aware of the errors.

Additionally, the Chapter 7 Trustee testified that the Debtors were cooperative and furnished to her all documents requested and answered all questions propounded by her at the 11 U.S.C. § 341 creditors' meeting. The Trustee further testified that, in her opinion, the Debtors had not engaged in any concealment or fraud.

Moreover, Rebecca explained the lack of reference on her original Schedule I to self-employment income from her day care business because she did not consider the day care operation to be a business. She admitted, however, that Schedule C of her 1996 and 1997 federal income tax returns reflected income and expenses from the day care operation. See Debtors' Exhibit Nos. 7 and 8 and Creditor's Exhibit Nos. 3 and 9. The amended Schedule I, which disclosed approximately $425.00 a month in income from the day care operation was her best estimate of her net income at that point in time. She testified that the original Schedule I listed only $115.00 monthly income. She realized this figure was incorrect and subsequently amended Schedule I to reflect the correct sum. Rebecca further testified that her income from day care operations widely fluctuates week to week depending on the number of children in her care. The Court finds that based on Rebecca's testimony, the Creditor has failed to demonstrate this element, namely that the statements on the amended

Schedule I regarding the Debtors' income were false.

Third, the Creditor must establish that false statements were knowingly made. The Court finds that this element has been satisfied with respect to the transfers to the insiders and the failure to list the home computer. The Debtors have not amended their answer to Question 3(b) in their Statement of Affairs to disclose any of the insider transfers made by them to family members within the one-year period pre-petition, nor have they disclosed the computer on their Schedule B. Considering the totality of the evidence, in light of the Debtors' testimony and demeanor, the Court finds that this element has been proven. At trial, the Debtors admitted that they did not schedule the home computer or the transfers to insiders. While the Debtors are not experienced business people, Daniel is a police officer and Rebecca, for over a decade, has operated a daycare business. Thus, the Debtors knew or should have known that the answer on their Statement of Affairs and their Schedule B were incomplete and inaccurate. In fact, Schedules B, C and I and the Statement of Affairs were amended, but failed to reference the home computer and the insider transfers.

Fourth, the Creditor must prove that the Debtors made the false statements with fraudulent intent. To find the requisite degree of fraudulent intent, the Court must find that the Debtors knowingly intended to defraud or engaged in behavior which displayed a reckless disregard for the truth. Yonikus, 974 F.2d at 905; Bailey, 147 B.R. at 165 (citing Yonikus). If a debtor's bankruptcy schedules reflect a "reckless indifference to the truth" then the plaintiff seeking denial of the discharge need not offer any further evidence of fraud. Calisoff, 92 B.R. at 355. The requisite intent under § 727(a)(4)(A) may be inferred from circumstantial evidence. Yonikus, 974 F.2d at 905 (citations omitted). However, discharge

should not be denied where the untruth was the result of mistake or inadvertence. Lanker v. Wheeler (In re Wheeler), 101 B.R. 39, 49 (Bankr. N.D. Ind. 1989). When a debtor is in doubt concerning disclosure, it is unquestioned that he is obligated to disclose. See Bank of India v. Sapru (In re Sapru), 127 B.R. 306, 315-16 (Bankr. E.D. NY 1990) ("multitude" of false oaths and omissions were material and justified denial of discharge); Behrman Chiropractic Clinics Inc. v. Johnson (In re Johnson), 189 B.R. 985, 994-95 (Bankr. N.D. Ala. 1995) (failure to disclose transferred assets warranted denial of discharge).

The Court infers the requisite fraudulent intent from all of the circumstantial evidence. The surrounding circumstances show that the Debtors had close personal family relationships with the insider transferees not disclosed in the Statement of Affairs. Further, they knew of the existence of the home computer. At the very least, the Debtors demonstrated a reckless disregard or indifference to the truth of their situation.

Finally, the Creditor must show that the statement related materially to the bankruptcy case. The Debtors' false oath must relate to a material matter before it will bar a discharge in bankruptcy. In re Agnew, 818 F.2d 1284, 1290 (7th Cir. 1987) (citation omitted). The test for materiality of the subject matter of false oath is whether 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." Bailey, 147 B.R. at 162 (citations omitted). A false oath may be material even though it does not result in any detriment or prejudice to the creditor. Scimeca v. Umanoff, 169 B.R. 536, 543 (D. N.J. 1993), aff'd, 30 F.3d 1488 (3d Cir. 1994); Congress Talcott Corp. v. Sicari (In re Sicari), 187 B.R. 861, 881 (Bankr. S.D. N.Y. 1994). The above discussed omissions from the Schedules and Statement

of Financial Affairs are material to the bankruptcy case. Failure to disclose transfers to family insiders and all property hinders the administration of the estate and obfuscates the true financial situation.

After considering the totality of the evidence, and having the benefit of hearing the testimony of the witnesses, the Court believes that there has been a preponderance of the evidence shown that the Debtors' discharge should be denied. In sum, the Court finds that the Creditor has shown by a preponderance of the evidence each element under § 727(a)(4)(A). Therefore, the Court denies the Debtors' discharge.

C. 11 U.S.C. § 727(a)(5)

In Counts III and IV of the complaint, the Creditor alleges that the Debtors failed to keep or preserve books or records from which their financial condition and business transactions might be ascertained. The Creditor alleges in Count XI of the complaint that the Debtors have participated in a course of gross misconduct so extreme that it has resulted in the unexplained loss of nearly $100,000.00 of assets. Further, in Count XII of the complaint, the Creditor contends that within six months prior to the filing of the bankruptcy petition, on July 17, 1998, the Debtors with the intent to defraud the creditors, conspired with an attorney, Neal Cerne, to elevate his position to that of a secured creditor. The Debtors allegedly accomplished this through a $35,000.00 lien in his favor on their real property.

Section 727(a)(5) provides that "[t]he court shall grant the debtor a discharge, unless . . . the debtor has failed to explain satisfactorily . . . any loss of assets or deficiency of assets to meet the debtor's liabilities. . . ." 11 U.S.C. § 727(a)(5). "Section 727(a)(5) is broadly drawn and clearly gives a court broad power to decline to grant a discharge in bankruptcy

where the debtor does not adequately explain a shortage, loss, or disappearance of assets." Martin, 698 F.2d at 886 (citations omitted). There are two stages of proof with respect to § 727(a)(5). Banner Oil Co. v. Bryson (In re Bryson), 187 B.R. 939, 955 (Bankr. N.D. Ill. 1995). First, the party objecting to discharge has the burden of proving that the debtor at one time owned substantial and identifiable assets that are no longer available for his creditors. Id. (citation omitted). Second, if the party objecting to the discharge meets his burden, then the debtor is obligated to provide a satisfactory explanation for the loss. Id. (citation omitted).

What constitutes a "satisfactory" explanation for § 727(a)(5) purposes is left to the discretion of the Court. Baum v. Earl Millikin, Inc., 359 F.2d 811, 814 (7th Cir. 1966); Olson v. Potter (In re Potter), 88 B.R. 843, 849 (Bankr. N.D. Ill. 1988). The Debtors' explanation, however, must consist of more than "a vague, indefinite, and uncorroborated hodgepodge of financial transactions." Baum, 359 F.2d at 814. Instead, "it must be a good faith explanation of what really happened to the assets in question." Potter, 88 B.R. at 849. "To be satisfactory, the explanation must demonstrate the debtor has exhibited good faith in conducting his affairs and explaining the loss of assets." Bay State Milling Co. v. Martin (In re Martin), 141 B.R. 986, 999 (Bankr. N.D. Ill. 1992) (citations omitted). A debtor "cannot abuse the bankruptcy process by obfuscating the true nature of his affairs and then refusing to provide a credible explanation." Johnson, 98 B.R. at 366 (quoting Martin, 698 F.2d at 888).

First, the Creditor must prove that the Debtors at one time owned substantial and identifiable assets that are no longer available for their creditors. The Creditor argues that

the approximate $22,000.00 received from the marital dissolution proceeding constitutes a substantial and identifiable asset. As previously stated, however, the Debtors adequately explained, and the credit union account statements corroborated, where the vast majority of these funds went. Next, the Creditor argues that there must be more than the $800.00 in furnishings and $500.00 in wearing apparel listed on the Schedules. Daniel testified that the items used for the operation of the day care business–car seats, playpens, and toys–have little value because they wear out quickly and therefore have to be replaced. It is the Creditor's burden, however, to prove that at one time the Debtors owned substantial and identifiable assets that are no longer available to the creditors. The Creditor has failed to meet this burden. Mere speculation that there must be more assets does not prove it so. Further, the Creditor's allegations that the Debtors expended money on inappropriate luxury items are not tantamount to proof that substantial and identifiable assets once existed and are either lost, concealed or not accounted for. Hence, the Court finds that the Creditor has failed to establish his burden of proof under this cause of action.

Despite the incomplete records, the Debtors have satisfactorily explained the loss. As previously stated, they demonstrated through documentary and testimonial evidence where the $22,000.00 went. Rebecca testified that she used the money to pay credit card debt and other bills. Moreover, the Creditor could have subpoenaed the credit union's records in order to trace where all of the money went, but failed to do so. There has not been a requisite showing by the Creditor that the Debtors at one time owned substantial assets that are no longer available for their creditors, nor is the Court convinced that the Debtors have not adequately explained their inability to pay their debts. Rather, the totality of the evidence

convinces the Court that the Debtors, like many others similarly situated, gradually incurred increasing amounts of debt which they could no longer service, and that at a point not long before they filed their petition, belatedly realized their insolvency and sought relief under the Bankruptcy Code.

Next, the Court will address the Creditor's argument that the Debtors and their attorney, Neal Cerne, wrongfully conspired to elevate him to the position of a secured creditor. Mr. Cerne testified that he was the attorney for Rebecca in the marital dissolution proceeding and received some payments for his services rendered and expenses advanced. Cerne testified that he recorded a lien on some real property of Rebecca to secure payment of his unpaid legal fees. While this might at best provide some grounds for the Trustee of the Debtors' bankruptcy estate to pursue a preference avoidance action under 11 U.S.C. § 547(b) (see, e.g., In re Brass Kettle Restaurant, Inc., 790 F.2d 574, 576 (7th Cir. 1986)), such payments and transfers to Cerne in light of the testimony adduced at trial are insufficient to prove a cause of action under § 727(a)(5). The securing of a lien by an attorney for unpaid fees may be preferential, but no evidence was adduced to show that it was the product of an unlawful conspiracy between attorney and client. The Court finds that the Creditor has failed to demonstrate that these transfers constitute grounds proving that the Debtors have failed to explain satisfactorily a loss of assets or a deficiency to meet liabilities. Consequently, the Creditor's objection to the Debtors' discharge under § 727(a)(5) is overruled.

V. CONCLUSION

For the foregoing reasons, the Court hereby grants judgment, in part, in favor of the

Creditor. The Debtors' discharge is denied and the objection thereto pursuant to § 727(a)(4)(A) is sustained. The objections under § 727(a)(2)(A) and § 727(a)(5) are overruled.

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

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 15th day of June, 2000, the Court hereby grants judgment, in part, in favor of the Plaintiff, Richard H. Divelbiss. The Debtors' discharge is denied and the objection thereto under 11 U.S.C. § 727(a)(4)(A) is sustained. The objections under 11 U.S.C. § 727(a)(2)(A) and 11 U.S.C. § 727(a)(5) are overruled.

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List