United States Bankruptcy Court
Southern District of Florida

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Bankruptcy Caption: In re Gerald Zwirn

Bankruptcy No. 04-40306 BKC-AJC

Adversary Caption: Franklin Day and W. Robert Curtis v. Gerald Zwirn

Adversary No. 05-1036 BKC-AJC-A

Date of Issuance: August 15, 2005

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff: W. Robert Curtis and Joel Tabas

Attorney for Defendant: David B. Javits

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:	)	Bankruptcy No. 04-40306 BKC-AJC
	)	Chapter 7
GERALD ZWIRN,	)	
	)	
Debtor.	)	
	)	
	)	
FRANKLIN DAY and W. ROBERT CURTIS,	)	
	)	
	)	Adv. No. 05-1036 BKC-AJC-A
Plaintiffs,	)	
	)	
v.	)	
	)	
GERALD ZWIRN,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the complaint filed by Franklin Day and W. Robert Curtis (the "Creditors") objecting to the discharge of Gerald Zwirn (the "Debtor") pursuant to 11 U.S.C. § 727(a)(2)(A) and seeking to except certain debts owed by the Debtor to the Creditors from discharge under 11 U.S.C. § 523(a)(4).[1] After the trial was held, the Creditors raised an objection to discharge pursuant to 11 U.S.C. § 727(a)(4)(A). For the reasons set forth herein, the Court grants judgment in favor of the Debtor and overrules the objections to discharge.

[1] After trial, the Creditors advised that they were withdrawing their § 523(a)(4) claim. Accordingly, the Court will not further address this cause of action.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Local Rule 87.2 of the United States District Court for the Southern District of Florida. It is a core proceeding under 28 U.S.C. § 157(b)(2)(I) and (J).

II. FACTS AND BACKGROUND

Many of the facts in this matter are undisputed. Creditor Franklin Day holds a legal malpractice claim against the Debtor that arose in 1992 and was reduced to judgment in the New York state court in 2001 in the approximate sum of $131,000.00 plus interest. Creditors' Ex. No. 2. Creditor W. Robert Curtis is Day's attorney and has a claim against the Debtor for attorney's fees and expenses that were incurred during his representation of Day in post-judgment collection proceedings in the New York state courts. The Debtor filed a voluntary Chapter 7 petition on November 2, 2004. Creditors' Ex. No. 21.

The gravamen of the complaint at bar is that during the state court litigation on the legal malpractice claim, the Debtor transferred approximately $600,000.00 to a newly created New York corporation which he controlled, thereby making himself judgment proof. Upon learning of this transfer in December of 2001, Day commenced a fraudulent transfer action against the Debtor and others. The Creditors contend that the Debtor testified falsely regarding the documentation relating to the fraudulent conveyance. They also claim, the New York corporation executed a promissory note by which the Debtor was owed $720,000.00 in principal and $120,000.00 in interest. According to the complaint, the promissory note was part of a scheme involving a bogus stock surrender agreement, under which the Debtor began to forgive, over time, the corporate debt owed to him with the intent to devalue the note in his subsequent

bankruptcy case. The Creditors allege that, in actuality, the Debtor is still owed the above referenced principal and interest and that the note is "being held for the [D]ebtor until the end of this bankruptcy action." Compl. at ¶ 20. Thus, the Creditors conclude, the Debtor's discharge should be denied under 11 U.S.C. § 727(a)(2)(A). The Creditors also contend that the Debtor violated 11 U.S.C. § 727(a)(4)(A). They claim that the Debtor testified falsely regarding the $600,000.00 transfer he made to the New York corporation.

The Debtor denies any fraudulent conduct on his part. He contends, the corporate note was scheduled as an asset in his bankruptcy case and is being administered by the Chapter 7 trustee. He further asserts that all acts taken with respect to the New York corporation occurred in 1995, years prior to the one year preceding the bankruptcy filing in 2004. Thus, he argues, the § 727(a)(2)(A) claim is time barred.

III. SUMMARY OF TRIAL TESTIMONY

The Debtor was the only witness to testify at trial, and the substance of his testimony was sparse and negligible. He admitted that he made a pre-petition transfer of over $600,000.00 to Danjo Automotive Corporation (the "New York corporation") in exchange for forty-five percent of its shares prior to the trial in the state court malpractice action. The Debtor could not remember the dates of various depositions he gave, nor the questions and answers propounded. Further, he did not recall signing or reviewing those depositions. The Debtor identified a financial statement dated July 13, 2000, wherein he and his wife listed assets of more than $20,000,000.00. Creditors' Ex. No. 20D. He admitted that some of those assets were scheduled on his bankruptcy petition, but he did not have a specific recollection of what was on those schedules. This was the complete sum and substance of the Debtor's testimony.

IV. STANDARDS FOR OBJECTIONS TO DISCHARGE

The discharge provided by the Bankruptcy Code is meant to effectuate the "fresh start" goal of bankruptcy relief. *Rutland v. Petersen (In re Petersen)*, 323 B.R. 512, 516 (Bankr. N.D. Fla. 2005); *Jensen v. Slater (In re Slater)*, 318 B.R. 881, 886 (Bankr. M.D. Fla. 2004). In exchange for that fresh start, the Code requires debtors to accurately and truthfully present themselves before the court. *Heidkamp v. Whitehead (In re Whitehead)*, 278 B.R. 589, 594 (Bankr. M.D. Fla. 2002). Indeed, a discharge is only for the "honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 287 (1991); *see also Turner v. Moeritz (In re Moeritz)*, 317 B.R. 177, 182 (Bankr. M.D. Fla. 2004).

The party objecting to a debtor's discharge has the burden of proving the objection. Fed. R. Bankr. P. 4005; *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 619 (11th Cir. 1984). Once the creditor meets the initial burden, the debtor must then put forth evidence to explain why the discharge should nevertheless be granted. *Posillico v. Bratcher (In re Bratcher)*, 289 B.R. 205, 217 (Bankr. M.D. Fla. 2003)*; United States v. Craig (In re Craig)*, 252 B.R. 822, 827 (Bankr. S.D. Fla. 2000). 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. *Petersen*, 323 B.R. at 516; *Whitehead*, 278 B.R. at 594. The objector must establish all required elements of the objection by a preponderance of the evidence. *Slater*, 318 B.R. at 886; *Moeritz*, 317 B.R. at 182; *Caterpillar, Inc. v. Gonzalez (In re Gonzalez)*, 302 B.R. 745, 751 (Bankr. S.D. Fla. 2003); *Craig*, 252 B.R. at 827.

V. DISCUSSION

A. 11 U.S.C. § 727(a)(2)(A)

First, the Creditor contends that the Debtor, with the intent to hinder, delay, or defraud his creditors, transferred, removed, or concealed his property interests in the New York corporation. Section 727(a)(2)(A) strictly prohibits such conduct and provides that:

> (a) The court shall grant the debtor a discharge, unless–
>
> . . .
>
> (2) the debtor, 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) (2005).

Under § 727(a)(2)(A), an objection to discharge will be sustained if the objecting party alleges and proves the following elements: (1) the debtor transferred, removed, destroyed, mutilated, or concealed property; (2) belonging to the estate; (3) within one year of filing the petition; and (4) with the intent to hinder, delay, or defraud a creditor of the estate. *Marine Midland Bank, N.A. v. Mollon*, 160 B.R. 860, 864 (M.D. Fla. 1993); *Citrus & Chem. Bank v. Floyd (In re Floyd)*, 322 B.R. 205, 209 (Bankr. M.D. Fla. 2005); *Bratcher*, 289 B.R. at 217; *Shappell's Inc. v. Perry (In re Perry)*, 252 B.R. 541, 547 (Bankr. M.D. Fla. 2000).

A concealment for purposes of § 727(a)(2) consists of "failing or refusing to divulge information to which creditors were entitled." *Jeffrey M. Goldberg & Assocs., Ltd. v. Holstein (In re Holstein)*, 299 B.R. 211, 229 (Bankr. N.D. Ill. 2003) (internal quotation omitted), *aff'd*, No. 03 C 8023, 2004 WL 2075442 (N.D. Ill. Aug. 31, 2004); *see also In re Scott*, 172 F.3d 959, 967 (7th Cir. 1999) (stating that concealment includes "preventing discovery" or "fraudulently

transferring or withholding knowledge or information required by law to be made known"). A concealment may be carried out in one of two ways: a debtor can conceal a transfer by misleading a creditor into thinking that the transfer did not occur, or the debtor can make a sham transfer whereby title to the property is transferred but the benefits of ownership are retained. *Gonzalez*, 302 B.R. at 752.

The creditor alleging intent to defraud under § 727(a)(2)(A) bears the burden of demonstrating actual fraudulent intent; constructive intent is insufficient. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 306 (11th Cir. 1994); *Wines v. Wines (In re Wines)*, 997 F.2d 852, 856 (11th Cir. 1993); *Moeritz*, 317 B.R. at 183. Fraudulent intent may be established by circumstantial evidence. *Mollon*, 160 B.R. at 864; *Floyd*, 322 B.R. at 210; *Friedman v. Kaiser (In re Kaiser)*, 94 B.R. 779, 780 (Bankr. S.D. Fla. 1988). Courts should consider a debtor's whole pattern of conduct when determining whether the debtor acted with intent to defraud. *Floyd*, 322 B.R. at 210. Courts look to commonly recognized factors to determine whether a debtor possessed the requisite fraudulent intent. These factors include: (1) the lack of adequate consideration for the property transferred; (2) a family or close relationship between the parties; (3) the retention of possession, benefit, or use of the property by the debtor; (4) the financial condition of the transferor before and after the transfer; (5) the cumulative effect of the transaction and the course of conduct after the onset of financial difficulties or threat of suit; (6) the secrecy of the conveyance; (7) the conveyance of all of the debtor's property; and (8) the general chronology and timing of events. *Moeritz*, 317 B.R. at 183-84; *Whitehead*, 278 B.R. at 595-96; *Perry*, 252 B.R. at 547. It is not necessary for a debtor's conduct to reach the level of fraud. *Ameritrust Nat'l Bank v. Davidson (In re Davidson)*, 178 B.R. 544, 550 (S.D. Fla. 1995). Instead, there must be a showing that at the time of the transfer, the debtor intended to hinder or delay the creditor. *Id.*

Section 727(a)(2)(A) is not meant to reach all bad acts that occurred prior to the bankruptcy case, but only those acts that occurred within a one-year limitations period. *Chi. Title Ins. Co., v. Mart (In re Mart)*, 87 B.R. 206, 209 (Bankr. S.D. Fla. 1988). However, under the doctrine of continuing concealment, a debtor's discharge may be denied where a debtor conceals the fact that he transferred assets more than one year prior to the bankruptcy filing and the concealment continues into the one-year period. *Gonzalez*, 302 B.R. at 752; *Holstein*, 299 B.R. at 231; *Clean Cut Tree Serv., Inc. v. Costello (In re Costello)*, 299 B.R. 882, 895 (Bankr. N.D. Ill. 2003); *Jeffrey M. Goldberg & Assocs., Ltd. v. Holstein (In re Holstein)*, 272 B.R. 463, 474 (Bankr. N.D. Ill. 2001); *Hall v. Hall (In re Hall)*, 126 B.R. 117, 120 (Bankr. M.D. Fla. 1991). "'[A]s long as the debtor allow[s] the property to remain concealed into the critical year,' the continuing concealment doctrine will apply." *Holstein*, 272 B.R. at 474 *(quoting Rosen v. Bezner*, 996 F.2d 1527, 1531 (3d Cir. 1993)). "The doctrine recognizes that the failure to reveal property previously concealed can be considered culpable conduct during the year before bankruptcy warranting a denial of discharge." *Holstein*, 299 B.R. at 231 (internal quotation and footnote omitted). Even if a debtor transfers legal title to the property, his continued use of the property is sufficient to constitute a continuing concealment. *Id.* at 229; *Costello*, 299 B.R. at 895. If a creditor can establish that the debtor retained either control or an equitable interest in the property, courts have denied discharge under the doctrine of continuing concealment. *Costello*, 299 B.R. at 895.

It is undisputed that the Debtor listed debts owed to him in Item 15 of his Schedule B as accounts receivable described as "notes totaling $720,000 from several corporations and signed by Joseph Paserelli." Creditors' Ex. No. 21. The Creditors' claims were scheduled on Schedule F. Day's claim was listed as disputed for $131,000.00, and Curtis' claim was listed as disputed for $750,000.00. *Id.* On his Schedule H, the Debtor listed among his co-debtors Joseph

Passarelli, the New York corporation, and five other corporate entities. *Id.* In his Statement of Financial Affairs, the Debtor identified business entities within the six years preceding the filing of his bankruptcy petition in which he had an interest as an officer, director, partner or managing executive, wherein he owned at least five percent or more of the voting or equity securities. *Id.* This list included the New York corporation and others listed on his Schedule H. *Id.*

The Court finds that these disclosures are hardly the stuff of concealment. Rather, the Debtor disclosed the information required of all debtors. These disclosures belie and effectively undercut the Creditors' claims of continuing concealment of the Debtor's interests in the New York corporation. None of the Debtor's limited testimony at trial established concealment, and no other witness testified in support of such claims of continuing concealment. Thus, the preponderance of the evidence fails to establish that the Debtor transferred, removed, destroyed, mutilated, or concealed property belonging to the estate.

Next, the Court finds that the Creditors failed to demonstrate that the Debtor had the requisite fraudulent intent under § 727(a)(2)(A). The evidence adduced at trial is simply insufficient to establish this element. The Debtor did not admit to any wrongful or fraudulent conduct, and the documentary evidence fails to establish fraudulent intent on the part of the Debtor. Absent any convincing evidence, the Creditors' assertions constitute unproven allegations and suspicions. These allegations do not constitute the objective proof required to establish the Debtor's wrongful scienter. Hence, the Court finds that the Creditors have failed to establish the requisite elements for the denial of the Debtor's discharge under § 727(a)(2)(A).

B. 11 U.S.C. § 727(a)(4)(A)

Next, the Creditors contend that the Debtor testified falsely regarding the documentation relating to the $600,000.00 transfer to the New York corporation. Section 727(a)(4)(A) bars a debtor's discharge if he knowingly and fraudulently makes a false oath or account in connection

with the case. Specifically, § 727(a)(4)(A) provides that:

> (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) (2005).

The purpose of § 727(a)(4)(A) is to "ensure 'that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs.'" *Bratcher*, 289 B.R. at 218 (*quoting Boroff v. Tully (In re Tully)*, 818 F.2d 106, 110 (1st Cir. 1987)). Section 727(a)(4)(A) ensures that adequate information is available to the case trustee and creditors without the need for examination or investigation to determine whether the information is true. *Craig*, 252 B.R. at 828-29; *see also Kaiser*, 94 B.R. at 781. Debtors have a "paramount duty to consider all questions posed on a statement or schedule carefully and see that the question is answered completely in all respects." *Craig*, 252 B.R. at 829 (internal quotation omitted). "Policy considerations mandate that the requirement to list all assets and liabilities is an absolute obligation of those seeking discharge of their debts." *Whitehead*, 278 B.R. at 594. "[A] debtor who fails to make a full and complete disclosure of relevant information places the right to the discharge in serious jeopardy." *Id.*

In order to prevail under § 727(a)(4)(A), a creditor must establish five elements: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew that 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. *Floyd*, 322 B.R. at 214; *Gonzalez*, 302 B.R. at 754; *Perry*, 252 B.R. at 549.

Turning to the matter at bar, the Creditors first must establish that the Debtor made a statement under oath. A debtor's petition, schedules, statement of financial affairs, and

statements made under examination constitute statements under oath for purposes of § 727(a)(4)(A). *Petersen*, 323 B.R. at 517; *Floyd*, 322 B.R. at 214. Accordingly, the Court finds that the Debtor's petition, Schedules, Statement of Financial Affairs, and any testimony given at the 11 U.S.C. § 341 meeting constitute statements made under oath. Hence, the first element is met.

Second, the Creditors must show that one or more of those statements made by the Debtor were false. Whether a debtor made a false oath within the meaning of § 727(a)(4)(A) is a question of fact. *Petersen*, 323 B.R. at 517. A false oath may include a knowing and fraudulent omission. Indeed, deliberate omissions by a debtor may result in the denial of a discharge. *Swicegood v. Ginn*, 924 F.2d 230, 232 (11th Cir. 1991); *Chalik*, 748 F.2d at 618; *Phillips v. Nipper (In re Nipper)*, 186 B.R. 284, 289 (Bankr. M.D. Fla. 1995). Debtors have an absolute duty to report all assets, even if they believe their assets are worthless or are unavailable to the bankruptcy estate. *Chalik*, 748 F.2d at 618; *Petersen*, 323 B.R. at 517. The veracity of a debtor's statements is essential to the administration of the bankruptcy case. *Chalik*, 748 F.2d at 618; *Whitehead*, 278 B.R. at 594.

The Creditors have not shown exactly which of the statements made by the Debtor are false on his Schedules or that he otherwise testified falsely under oath. It is incumbent upon the Creditors to establish the falsity of the Debtor's statements in order for the discharge to be denied. *See Floyd*, 322 B.R. at 215 (finding that the movant failed to establish the falsity of any statements on the debtor's schedules and that thus, discharge would not be denied). In short, the Court finds that the Creditors have failed to meet their burden of proof on this element.

Third, the Creditors must establish that the false statements and omissions were knowingly made. The Debtor, an experienced businessman and attorney, certainly knew or should have known that statements on Schedules and Statement of Financial Affairs are made

under penalty of perjury. However, no evidence was proffered to show which statements or omissions were knowingly false. The evidence at trial was insufficient to establish this third element.

Fourth, the Creditors must prove that the Debtor made the false statements with fraudulent intent. A creditor must show that in making a false oath or account, the debtor acted with knowledge and intent to defraud. *Petersen*, 323 B.R. at 517; *Bratcher*, 289 B.R. at 218; *Grant v. Sadler (In re Sadler)*, 282 B.R. 254, 264 (Bankr. M.D. Fla. 2002); *Perry*, 252 B.R. at 549. As with § 727(a)(2)(A), direct evidence of intent to defraud may not be available. Thus, the requisite intent under § 727(a)(4)(A) may be inferred from circumstantial evidence or by inference based on a course of conduct. *Petersen*, 323 B.R. at 517; *Bratcher*, 289 B.R. at 218; *Sadler*, 282 B.R. at 264; *Kaiser*, 94 B.R. at 780. The requisite intent may also be inferred when a debtor's conduct evidences a cavalier disregard for the truth. *Ingersoll v. Kriseman (In re Ingersoll)*, 124 B.R. 116, 123 (M.D. Fla. 1991). "It makes no difference that [the debtor] does not intend to injure his creditors when he makes a false statement." *Chalik*, 748 F.2d at 618.

The Court finds that the proof adduced at trial was simply insufficient to establish this element. Intent to defraud is not presumed as the Creditors implicitly argue. The proof at trial

was woefully short of establishing that, at the very least, the Debtor demonstrated a reckless disregard for or indifference to the truth.

Finally, the Creditors must show that the statements related materially to the bankruptcy case. A debtor's false oath must relate to a material matter before it will bar a discharge in bankruptcy. *Bratcher*, 289 B.R. at 218; *Sadler*, 282 B.R. at 264; *Perry*, 252 B.R. at 549. The test for materiality of the subject matter of a false oath or account 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." *Chalik*, 748 F.2d at 618. A false oath may be material even though it does not result in any detriment or prejudice to the creditor. *Id.*

Although the Court is left to speculate regarding exactly which statements made by the Debtor on his Schedules or Statement of Financial Affairs or at the § 341 meeting were allegedly materially false, all such statements relate materially to his bankruptcy case. Hence, the Court finds that the Creditors have demonstrated that the statements made in those documents and testimony related materially to the bankruptcy case. Nevertheless, the Court finds that the Creditors have failed to demonstrate all of the necessary elements for the denial of the Debtor's discharge under § 727(a)(4)(A).

VI. CONCLUSION

For the foregoing reasons, the Court finds that the Creditors have not established all required elements for their objections to the Debtor's discharge under § 727(a)(2)(A) or § 727(a)(4)(A). Accordingly, the Court enters judgment in favor of the Debtor and overrules the objections to the discharge.

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