**United States Bankruptcy Court**
**Northern District of Illinois**
**Eastern Division**

**Transmittal Sheet for Opinions for Publishing and Posting on Website**

**Will this opinion be Published?** No

**Bankruptcy Caption:** In re John McAniff

**Bankruptcy No.** 02 B 38990

**Adversary Nos.** 03 A 4407, 03 A 4408

**Date of Issuance:** May 21, 2004

**Judge:** A. Benjamin Goldgar

**Appearance of Counsel:**

Attorney for Debtor: Michael J. Cunningham, Law Offices of Peter Francis Geraci, Chicago, IL

Attorney for Trustee: Joel A. Schechter, Chicago, IL

**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| In re: | ) | Chapter 7 |
| | ) | |
| JOHN McANIFF, | ) | No. 02 B 38990 |
| | ) | |
| Debtor. | ) | Judge Goldgar |
| | ) | |
| JOEL A. SCHECHTER, Trustee, | ) | |
| | ) | |
| Plaintiff, | ) | |
| v. | ) | No. 03 A 4407 |
| | ) | |
| JOHN McANIFF, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |
| JOEL A. SCHECHTER, Trustee, | ) | |
| | ) | |
| Plaintiff, | ) | |
| v. | ) | No. 03 A 4408 |
| | ) | |
| JOHN McANIFF, | ) | |
| | ) | |
| Defendant. | ) | |

## MEMORANDUM OPINION AND ORDER

This chapter 7 case is before the court on two adversary proceedings that Trustee Joel A. Schechter has brought against debtor John McAniff. In both, the trustee alleges that (1) the debtor failed to disclose in his bankruptcy petition that he was owed a $48,340 debt at time he filed his petition, (2) the debtor was thereafter paid the $48,340,

and (3) the trustee only discovered the debt and payment after the debtor had been granted a discharge. In the first adversary (No. 03 A 4007), the trustee asks the court to order the debtor to turn over the $48,340. In the second (No. 04 A 4008), the trustee asks the court to revoke the debtor's discharge.

The trustee has moved for summary judgment in both adversary proceedings. Since the motions are for all practical purposes unopposed,[1/] these matters are as briefed

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[1/] The court's local rules set out a procedure for summary judgment motions. The movant must submit a statement of facts with citations to evidentiary material supporting each fact. L.R. 7056-1(B). The opposing party must then respond to each fact, admitting or denying it and including "in the case of any disagreement" references to supporting evidentiary material. L.R. 7056-2(A)(2)(a). The opposing party must also submit his own statement offering any additional facts, again with citations to supporting material, L.R. 7056-2(A)(2)(b), to which the moving party may respond, L.R. 7056-1(C). Facts not denied in either statement are deemed admitted. L.R. 7056-1(C), 7056-2(B). This procedure is "not a mere technicality," *Davis v. Illinois St. Police Fed. Credit Union,* 244 B.R. 776, 782 (Bankr. N.D. Ill. 2000), and its requirements are strictly enforced, *see McGuire v. United Parcel Service,* 152 F.3d 673, 675 (7th Cir. 1998) (discussing identical district court procedure).

The debtor did not even attempt to follow the proper procedure. On April 7, he filed in each adversary a two-page "response to plaintiff's motion for summary judgment" in which he simply admitted or denied the statements in the trustee's motion. The debtor did not respond to the trustee's Rule 7056-1(B) statement of facts, did not submit his own Rule 7056-2 statement of facts, and did not submit a supporting memorandum of law. On April 22, after briefing on the motion was concluded (and without leave of court), the debtor filed the same response again in one of the adversaries, this time attaching a faxed copy of his affidavit. As far as the court can tell, the original affidavit was not filed, attachments mentioned in the affidavit were not attached, and the debtor still did not submit the required response to the trustee's statement of facts, his own statement of facts, or a memorandum of law. The untimely and inadequate response was stricken by order entered April 23, 2004.

Under these circumstances, the trustee's motion is effectively unopposed. All of the trustee's facts are deemed admitted. L.R. 7056-1(C), 7056-2(B).

as they are going to be and are ready for decision. For the reasons that follow, the trustee's motion is granted on his turnover complaint, but the trustee's motion on his complaint to revoke the discharge is denied.

## 1. Jurisdiction

The court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1334(a) and 157(a), and the district court's Internal Operating Procedure 15(a). These are core proceedings. 28 U.S.C. §§ 157(b)(2)(E), (J); *see In re Boston Regional Med. Ctr.*, 265 B.R. 645, 650 (Bankr. D. Mass. 2001) (proceeding seeking turnover is core); *State Bank of India v. Kaliana (In re Kaliana),* 202 B.R. 600, 602 (Bankr. N.D. Ill. 1996) (proceeding to revoke discharge is core under section 157(b)(2)(J)). The court accordingly may enter a final judgment. *In re Smith,* 848 F.2d 813, 816 (7th Cir. 1988).

## 2. Facts

The following facts are undisputed. Debtor John McAniff lives in Long Grove, Illinois, and was part owner of an S corporation doing business under the name ValueQuest International, Ltd. ("VQI"). (Answer, ¶ 6; Schechter Aff., ¶ 3).[2/] The debtor worked for VQI as some kind of appraiser. (Sched. I).

The debtor also made a number of loans to VQI, although the amount of the loans

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[2/] Since the relevant facts are largely identical in both adversaries, and since similar supporting materials were submitted in both, except where specifically noted the court will refer to the materials filed in No. 03 A 4408.

is not entirely clear. (Schechter Aff., Ex. (a)). What is clear (from a worksheet the debtor later provided the trustee) is that between at least January 1, 2002 and June 30, 2002, the debtor lent VQI $50,240, and that the total amount of loans the debtor made to VQI exceeded $90,000. (*Id.*). Between January 1, 2002, and October 31, 2002, VQI also repaid the debtor $43,975. (*Id.*). As of October 31, 2002, however, VQI still owed the debtor $48,340. (Schechter Aff., Exs. (a), (c)).

On October 7, 2002, the debtor filed his petition for relief under chapter 7 of the Bankruptcy Code. The required schedules were filed the same day. Despite the admonition in the petition to list on Schedule B "all property . . . of whatever kind," the debtor failed to disclose VQI's $48,340 debt to him. On the contrary, for "accounts receivable" and "other liquidated debts owing debtor including tax refunds," Schedule B declared, simply: "None." (Answer, ¶¶ 18, 21; Sched. B at 2). That declaration was false. Nonetheless, the debtor signed the petition, stating under penalty of perjury that the petition and schedules were accurate. (Answer, ¶ 19; Pet'n at 20).

Between October 7, 2002, and September 2, 2003, VQI paid the debtor the entire $48,340 it owed him. (Answer, ¶ 22; Schechter Aff. ¶¶ 14, 19, and Ex. (c)). At no point during this period, however, did the debtor notify the trustee of VQI's debt or VQI's payment of it. Nor did the debtor amend his schedules to reflect the debt or the payment.

On March 20, 2003, the debtor was granted a discharge.

The trustee first learned of VQI's indebtedness to the debtor on September 2, 2003, when the trustee examined the debtor pursuant to Bankruptcy Rule 2004.

(Answer, ¶ 14; Schechter Aff. at ¶ 11). The trustee also learned for the first time that debtor had been paid the full $48,340. (Answer in No. 03 A 4407, ¶ 10).[3/]

Three weeks later, the debtor amended his Schedule B. For "other liquidated debts owing debtor including tax refunds," the amended Schedule B declared: "Debtor owes himself $48,000 on a loan he made to his S-Corp, ValueQuest International, Ltd., for start-up costs."[4/] (Amend. Sched. B at 2). However, the amended Schedule B continued to list the value of the debtor's interest as "none." (*Id.*).

Shortly thereafter, the trustee commenced two adversary proceedings against the debtor. In one, he sought an order requiring the debtor to turn over the $48,340 he received because the monies were property of the estate. In the other, he sought to have the debtor's discharge revoked pursuant either to section 727(d)(1) or section 727(d)(2) of the Code, 11 U.S.C. §§ 727(d)(1), (2). The debtor answered, denying any liability.

### 3. Analysis

The trustee now requests entry of summary judgment on his two complaints. The

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[3/] Although this admission was made in the debtor's answer in No. 03 A 4407 and is offered by the trustee in No. 03 A 4408, admissions a party makes in his pleadings in one case are admissible against him in other cases. 4 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 418 at 258 (2d ed. 1994); *see, e.g., Enquip, Inc. v. Smith-McDonald Corp.,* 655 F.2d 115, 118-19 (7th Cir. 1981).

[4/] Even this new assertion was false. The debtor's Schedule I showed that as of 2002 the debtor had been employed at VQI for seven years, or since at least 1995. (Sched. I). The worksheet the debtor supplied to the trustee, however, showed that the debtor was still lending VQI substantial sums of money in 2002. (Schechter Aff., Ex. (c)). Loans made seven years into VQI's operations could hardly have been for "start-up costs."

standard under Rule 56 is familiar. Summary judgment is appropriate if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) (made applicable by Fed. R. Bankr. P. 7056); *Estate of Allen v. City of Rockford,* 349 F.3d 1015, 1019 (7th Cir. 2003). On a motion for summary judgment, "the court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Payne v. Pauley,* 337 F.3d 767, 770 (7th Cir. 2003) (internal quotation omitted).

**a. Turnover of Funds**

The trustee is unquestionably entitled to summary judgment on his complaint for turnover in No. 03 A 4407.

The filing of a bankruptcy petition creates an estate consisting of the debtor's property. 11 U.S.C. § 541(a). The Code contains an "expansive definition" of property, *Koch Refining v. Farmers Union Central Exchange, Inc.,* 831 F.2d 1339, 1343 (7th Cir. 1987), encompassing "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Under this definition, "virtually all property of the debtor" becomes property of the estate. *In re Yonikus,* 996 F.2d 866, 869 (7th Cir. 1993). "In fact, every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541." *Id.*

Not surprisingly, then, "property" for purposes of section 541 includes money that a debtor has a right to receive. *See, e.g., Crysen/Montenay Energy Co. v. Esselen Assocs.,*

*Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1101 (2nd Cir. 1990) (debtor's right to collect accounts receivable is "property of the estate"). Among other things, an outstanding loan that a debtor expects to be repaid is property of the debtor's bankruptcy estate. *Bay St. Milling Co. v. Martin (In re Martin)*, 141 B.R. 986, 993 (Bankr. N.D. Ill. 1992); *see also Telesphere Liquidating Trust v. Galesi,* 246 B.R. 315, 319-20 (N.D. Ill. 2000) (holding promissory note payable to debtor to be property of the estate and deeming the proposition "obvious"). The right of the debtor here to repayment of loans he made to VQI accordingly became property of his bankruptcy estate when he began his case.[5/]

Because that right was property of the estate, it belonged to the trustee to exercise on the estate's behalf, not to the debtor to exercise for himself. Section 542(b) of the Code makes payable to the trustee any "debt that is property of the estate and that is matured, payable on demand, or payable on order." 11 U.S.C. § 524(b). The evidence here suggests that the loans to VQI were either matured debts or, more likely, debts payable on demand, since VQI repaid various loans to the debtor in the year before the bankruptcy and in fact paid the loans in question during year after the bankruptcy petition was filed. (*See* Schechter Aff., Ex. (a)). No evidence shows otherwise. The

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[5/] As the trustee points out, the debtor here appears to take the view that because VQI was an S corporation, he and VQI were one and the same, and so he merely made and then repaid loans to himself. (The trustee finds this view in the now-stricken affidavit, but it also shows up in the debtor's amended Schedule B). If that is the debtor's view, he is mistaken. An S corporation "is a separate entity from its shareholders." *Catalano v. Comm'r,* 240 F.3d 842, 843 (9th Cir. 2001). Its business "is not the business of its shareholders." *Ding v. Comm'r,* 200 F.3d 587, 590 (9th Cir. 2000) (internal quotation omitted).

$48,340 owed at the outset of the case should therefore have been paid to the trustee.

Although VQI paid the debtor, not the trustee as it should have, the funds are still recoverable. Section 542(a) requires "an entity . . . in possession, custody, or control, during the case, of property that the trustee may use, sell or lease" to deliver that property to the trustee.[6/] 11 U.S.C. § 542(a); *Boyer v. Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. (In re USA Diversified Prods., Inc.)*, 100 F.3d 53, 56 (7th Cir. 1996); *In re Roti*, 271 B.R. 281, 292 (Bankr. N.D. Ill. 2002). More to the point here, section 521(4) makes it the debtor's duty "to surrender to the trustee all property of the estate." 11 U.S.C. § 521(4); *In re Schick*, 215 B.R. 4, 7-8 (Bankr. S.D.N.Y. 1997); *Barbee v. Barry (In re Barry)*, 170 B.R. 179, 183 n.1 (Bankr. S.D. Fla. 1994). The debtor is obligated to pay the trustee the funds he received.

In sum, then, VQI's debt was property of the estate, and the $48,340 the debtor received in payment of that debt must be turned over to the trustee. The trustee's motion for summary judgment on his complaint for turnover in No. 03 A 4407 will be granted.

**b. Revocation of Discharge**

The trustee fares less well on his complaint to revoke the debtor's discharge in No. 03 A 4408.

In the complaint, the trustee asks to have the debtor's discharge revoked on two

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[6/] The Code defines an "entity" to include a "person." 11 U.S.C. § 101(15). The debtor here is a person.

grounds. First, the trustee alleges that the debtor fraudulently failed to schedule as an asset the $48,340 VQI debt, so that his discharge must be revoked under section 727(d)(1) of the Code, 11 U.S.C. § 727(d)(1). Second, the trustee alleges that when the debtor was paid the $48,340 he received property of the estate which he then fraudulently failed to report or pay to the trustee, requiring revocation of the debtor's discharge under section 727(d)(2), 11 U.S.C. § 727(d)(2).

Revocation of a debtor's discharge is considered a "harsh measure," contrary to the Code's general policy of giving debtors a fresh start. *Rezin v. Barr (In re Barr),* 207 B.R. 160, 165 (Bankr. N.D. Ill. 1997) ("*Barr I*") (quoting *Kaliana,* 202 B.R. at 603). Section 727(d) is therefore construed against the objecting party and in favor of the debtor. *Id.* That said, however, the benefit of discharge is reserved for "the 'honest but unfortunate debtor.'" *Jeffrey M. Goldberg & Assocs., Ltd. v. Holstein (In re Holstein),* 299 B.R. 211, 233 (Bankr. N.D. Ill. 2003) (quoting *Grogan v. Garner,* 498 U.S. 279, 287 (1991)). If section 727(d) is satisfied, the debtor has been less than honest. He deserves no discharge.

To warrant revocation under section 727(d)(1), the trustee must prove two elements: (1) that the debtor procured his discharge by fraud; and (2) that the trustee did not know and could not have known of the fraud before the discharge. 11 U.S.C. § 727(d)(1); *Swartz v. Spears (In re Spears),* 291 B.R. 825, 828 (Bankr. C.D. Ill. 2003); *Barr I,* 207 B.R. at 165; *Kaliana,* 202 B.R. at 604. "Fraud" for this purpose means "fraud in fact." *Barr I,* 207 B.R. at 165; *Kaliana,* 202 B.R. at 604. The debtor, in other words, must have had "an intent to deceive." *Barr I,* 207 B.R. at 165; *Kaliana,* 202 B.R. at 604.

To justify revocation under section 727(d)(2), the trustee must prove (1) that the debtor acquired property of the estate (or become entitled to acquire it), and (2) that the debtor "knowingly and fraudulently" failed to report the acquisition or failed to deliver the property to the trustee. 11 U.S.C. § 727(d)(2). The second element requires proof that "the debtor knowingly intended to defraud the trustee," or at least that he "engaged in such reckless behavior as to justify the finding of fraud."[7/] *Yonikus,* 974 F.2d at 905; *Barr II,* 207 B.R. at 176.

The undisputed facts here make out the better part of a revocation claim. They leave no doubt that the debtor failed to report the VQI debt when his petition was filed. Indeed, the evidence shows that the debtor did not amend his schedules to disclose the debt until almost a year after his October 2002 filing and almost six months after his discharge. By then, the entire debt had already been paid to him. Yet, the debtor did not pass the money he acquired on to the trustee, instead keeping it for himself. At no point, moreover, did the trustee know or have reason to know either that the debtor was owed the debt or that the debt had been paid until the trustee finally managed to flush out the information long after the debtor's discharge. These facts establish all the necessary elements under both sections 727(d)(1) and (2) – except the requisite mental state.

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[7/] Some courts hold that under section 727(d)(2) the trustee must also show he did not know of the fraud until after the discharge. *See Olsen v. Reese (In re Reese),* 203 B.R. 425, 431 (Bankr. N.D. Ill. 1997) (noting this in dictum and citing cases). But section 727(d)(2) says nothing about the trustee's lack of knowledge, and the better view is that there is no such requirement. *Rezin v. Barr (In re Barr),* 207 B.R. 168, 174 (Bankr. N.D. Ill. 1997) ("*Barr II*").

The mental state is the sticking point. The trustee has adduced no direct evidence that the debtor procured his discharge by "fraud" or that he "knowingly and fraudulently" failed to report the payment or deliver up the money. The evidence shows only the bare omission of the debt from the schedules, the post-petition payment of the debt, the non-disclosure of the payment, and the trustee's eventual discovery post-discharge of both the debt and payment.

It is true, of course, that section 727(d) does not require *direct* evidence of intent. An inference of fraudulent intent can also be "drawn from a course of conduct," or "from all the surrounding circumstances." *Yonikus,* 974 F.2d at 905. It is also true that a finder of fact could reasonably infer fraudulent intent from the debtor's course of conduct and from the circumstances here. The problem for the trustee, however, is that a finder of fact could just as reasonably infer that the debtor acted, not with any fraudulent intent, but out of ignorance or ineptitude. (And if the debtor was inept, he may or may not have been sufficiently reckless as to imply fraud.) Although the facts are undisputed, in other words, the court is faced with conflicting, reasonable inferences from those facts.

That is enough to torpedo the trustee's motion. The court cannot draw the inference the trustee wants because on summary judgment all reasonable inferences must be drawn in favor of the non-movant. *Mattson v. Caterpillar, Inc.,* 359 F.3d 885, 888 (7th Cir. 2004); *Williamson v. Indiana Univ.,* 345 F.3d 459, 462 (7th Cir. 2003). What that often-repeated statement of law means, the Seventh Circuit explained in *Harley-Davidson Motor Co. v. PowerSports Inc.,* 319 F.3d 973 (7th Cir. 2003), is that summary judgment "is

not appropriate if the court must make a choice of inferences." *Id.* at 989 (internal quotation omitted). Granting the trustee's motion here would entail such a choice.

Because there is a genuine issue of material fact about the debtor's mental state, the trustee is not entitled to summary judgment on his complaint to revoke discharge in No. 03 A 4408. The motion for summary judgment will be denied.

## 4. Conclusion

The trustee's motion for summary judgment on his complaint for turnover against the debtor in No. 03 A 4407 is granted, and the debtor is ordered to turn over to the trustee the sum of $48,340. A separate Rule 9021 judgment will be entered in No. 03 A 4407 in accordance with this opinion.

The trustee's motion for summary judgment on his complaint to revoke discharge in No. 03 A 4408 is denied. A final pretrial order will be entered, and the matter will be set for a trial on a date to be determined.

Dated: May 21, 2004

ENTER: _____
A. Benjamin Goldgar
United States Bankruptcy Judge