IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

IN RE: GREGORY D. DICKERSON, Debtor **No. 6:17-bk-72936**
Ch. 7

LAURA AND DAVID LOVEDAY **PLAINTIFFS**

v. **6:18-ap-7038**

GREGORY D. DICKERSON **DEFENDANT**

ORDER DENYING DEBTOR'S DISCHARGE

Before the Court is the *Complaint For Denial of Discharge* filed on June 8, 2018, and the *Amended Complaint For Denial of Discharge* filed on June 11, 2018, by Walden Cash on behalf of creditors Laura and David Loveday, and the *Answer to Complaint* filed on June 28, 2018, by Steve Westerfield on behalf of the debtor, Gregory Dickerson. The Lovedays are moving under 11 U.S.C. § 727(a)(2)(B), (a)(3), and (a)(4)(A). The Court heard the complaint and answer on October 18, 2018. For the reasons stated below, the Court denies the debtor his discharge under § 727(a)(2) and (a)(4).

BACKGROUND

On October 23, 2017, the Lovedays obtained a judgment in the Circuit Court of Garland County against Greg Dickerson d/b/a Greg's Seamless Guttering for damages relating to the cost of replacing a defectively installed roof in the total amount of approximately $33,000.00. An additional judgment for attorney fees in the amount of $9000.00 was added to the initial judgment on November 2, 2017. Steve Westerfield represented the debtor in the state court action.

On November 16, two weeks later, the Lovedays served a Writ of Garnishment on

EOD: November 6, 2018

Simmons Bank [Simmons] for a total amount due of $42,830.95. The Court does not know if Simmons filed a written answer to the Writ. However, on November 22, 2017, less than one week after the Writ of Garnishment was served on Simmons, Steve Westerfield, on behalf of the debtor, filed a voluntary chapter 13 skeletal petition consisting of 10 pages. The petition listed only one creditor: Laura Loveday. The debtor signed the skeletal petition declaring under penalty of perjury that the information in the petition was true and correct. Steve Westerfield also signed the skeletal petition certifying that he had "no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect." The only schedule filed with the petition was the creditor matrix that listed only Laura Loveday despite Laura Loveday's and David Loveday's known judgment against the debtor dated less than one month prior.

According to the parties, Simmons, apparently without direction from either the bankruptcy court or the state circuit court, released the funds it was holding under the garnishment shortly after the petition was filed. According to the bank statements that were introduced, on November 29, 2017, the debtor withdrew $7758.00 in cash and on November 29 and 30, 2017, he wrote checks totaling $5649.27, effectively removing approximately $13,400 from his account at Simmons.

LAW

Because the denial of a discharge is a "harsh and drastic penalty," the statute's provisions are "strictly construed in favor of the debtor." *Korte v. U.S. Internal Revenue Serv*. (*In re Korte*), 262 B.R. 464, 471 (B.A.P. 8th Cir. 2001) (internal citations omitted). Once a party objecting to a debtor's discharge "establishes a prima facie case, the burden then shifts to the debtor defendant to offer credible evidence to satisfactorily explain his conduct." *Robbins v. Haynes* (*In re Haynes*), 549 B.R. 677, 685 (Bankr. D.S.C. 2016). However, the objecting party bears the ultimate burden of proving by a preponderance of the evidence that a debtor is not entitled to a discharge. *In re Korte*, 262 B.R. at 471.

"Bankruptcy provides debtors with a great benefit: the discharge of debts." *Home Serv.*

Oil Co. v. Cecil (*In re Cecil*), 542 B.R. 447, 454 (B.A.P. 8th Cir. 2015) (quoting *Ellsworth v. Bauder* (*In re Bauder*), 333 B.R. 828, 834 (B.A.P. 8th Cir. 2005) (Schermer, J., dissenting)). However, "[t]he price a debtor must pay for that benefit is honesty and candor. If a debtor does not provide an honest and accurate accounting of assets to the court and creditors, the debtor should not receive a discharge." *Id.* The bankruptcy code "requires nothing less than a full and complete disclosure of any and all apparent interests of any kind." *In re Korte*, 262 B.R. at 474 (citation omitted). When a debtor fails to comply with the code's disclosure and veracity requirements, it "necessarily affects the creditors, the application of the Bankruptcy Code, and the public's respect for the bankruptcy system as well as the judicial system as a whole." *Nat'l Am. Ins. Co. v. Guajardo* (*In re Guajardo*), 215 B.R. 739, 742 (Bankr. W.D. Ark. 1997). "'A fundamental purpose of § 727(a) . . . is to ensure that dependable information is supplied for those interested in the administration of the bankruptcy estate on which they can rely without the need for the trustee or other interested parties to dig out the true facts in examinations or investigations.'" *In re Haynes*, 549 B.R. at 686 (relating to § 727(a)(4)(A) and quoting *Sergent v. Haverland*, (*In re Haverland*), 150 B.R. 768, 770 (Bankr. S.D. Cal. 1993)).

To that end, § 727(a)(2)(B) provides for the denial of a debtor's discharge if the debtor transferred, removed, destroyed, mutilated, or concealed property of the estate. To prevail, the creditor must prove that–

(1) the act complained of was done with property of the estate;

(2) the act was that of the debtor;

(3) the act consisted of a transfer, removal, [mutilation, concealment] or destruction of estate property; and

(4) the act was done with the intent to hinder, delay, or defraud a creditor.

See, e.g., Korte, 262 B.R. at 472 (discussing elements of § 727(a)(2)(A)).

Similarly, § 727(a)(4)(A) provides for the denial of a debtor's discharge if "the debtor knowingly and fraudulently, in or in connection with the case, made a false oath or

account." 11 U.S.C. § 727(a)(4)(A). To prevail, the creditor must prove that–

(1) the debtor made a statement under oath;

(2) the statement was false;

(3) the statement was made with fraudulent intent;

(4) the debtor knew the statement was false; and

(5) the statement related materially to the debtor's bankruptcy.

Helena Chem. Co. v. Richmond (*In re Richmond*), 429 B.R. 263, 307 (Bankr. E.D. Ark. 2010).

FINDINGS

The following findings by the Court are applicable to either § 727(a)(2), (a)(4), or both.

Petition

1. Steve Westerfield, on behalf of the debtor, filed a skeletal chapter 13 petition on November 22, 2017, and later moved to extend time to file schedules so the debtor could collect "a list of all creditors' addresses and account numbers in order to file his schedules." As stated, the initial filing included only one creditor: Laura Loveday.
2. The debtor stated in his petition that he would pay the filing fee when the petition was filed (question 8). Yet, three minutes after filing the petition, he filed an application to pay the filing fee in installments.
3. The debtor signed his petition, declaring under penalty of perjury that the information in the petition was true and correct.
4. In his petition, the debtor represented that he had used no business names in the past 8 years (question 4), even though at the time he filed, he had a bank account in the name of Greg's Seamless Guttering and the state court judgment dated less than a month earlier was titled Laura Loveday and David Loveday vs. Greg Dickerson d/b/a Greg's Seamless Guttering. The debtor testified that he filed bankruptcy because of the garnishment. The title of the garnishment also listed Greg Dickerson d/b/a Greg's Seamless Guttering.

5. The debtor represented in his petition that he was not a sole proprietor (question 12) despite both the state court action and the Writ of Garnishment listing the debtor as "d/b/a Greg's Seamless Guttering."

After the skeletal petition was filed, on December 6, 2017, Steve Westerfield, on behalf of the debtor, filed a *Motion to Extend Deadline to File Schedules*. In the motion, the debtor said that he needed more time to collect a list of all creditors' addresses and account numbers. The Court granted the motion and allowed the debtor until December 20, 2017, to file the missing schedules and statements.

Schedules

1. The debtor, through Westerfield, filed his deficient schedules on December 20, 2017. Six minutes later, the debtor converted his case to a case under chapter 7.
2. The debtor had about a month to make sure the information contained within the schedules was accurate as of the date of filing the petition. The debtor declared under penalty of perjury that he had read the summary and schedules and that they were true and correct. He also declared that the answers contained in the Statement of Financial Affairs [SOFA] were true and correct.
3. The debtor listed two checking accounts held at Simmons with balances of $4000.00 and $60.00, respectively. He also listed cash in the amount of $100.00. In fact, one Simmons account (9100) had $11,178.30 on the date he filed his petition, November 22, 2017, and the other Simmons account (5662) had $144.97. The November bank statements were available to the debtor prior to the filing of his schedules.
4. The debtor stated that he had no other property of any kind that was not already listed. However, when the debtor tried to explain the difference between what he listed as his bank balances and what the bank statements reflected, he characterized the difference as "customers' money" that was in his account.
5. The debtor stated on Schedule D that he only had one creditor, Santander, that was secured by property. This statement was made despite the fact that Laura and

David Loveday had a judgment against the debtor and a garnishment at the time the petition was filed, which gave them a secured interest in the money held by the bank. *See* Ark. Code Ann. § 16-110-401 (Repl. 2016) (and cases cited).[1]

6. The debtor listed Laura Loveday and five other creditors on Schedule F as his only unsecured creditors at the time of filing. However, he also testified that he did not list the contractors to whom he owed money when he filed his petition because he had paid them between the filing of his petition and the filing of his schedules. Hence, according to the debtor, they "were no longer creditors."

7. The debtor listed four dependents on his Schedule J, with no ages given. He also listed no expense for rent or mortgage.[2] Contrarily, the debtor's 2017 tax return that was introduced only lists one dependent.

8. The debtor's SOFA states that his sources of income for the past three years are from wages, commissions, bonuses, and tips, not from "operating a business." However, the debtor's testimony and his tax returns indicate that most of his income is from operating his business, Greg's Seamless Guttering.

9. The debtor's SOFA states that within the one year prior to filing of his petition, none of his property was garnished. However, the debtor filed his bankruptcy petition less than one week after Simmons Bank was served a Writ of Garnishment and the debtor's bank accounts were frozen. The debtor testified that he filed his petition because of the Lovedays' garnishment.

10. The debtor's SOFA states that he was holding no property that someone else owned. However, the debtor testified that the money in his Greg's Seamless Guttering account that he did not list in his schedules belonged to his customers.

11. The debtor's SOFA states that he did not own or have any connection with a business within four years before filing his petition. This statement was made

---

[1] The Court is not going to speculate why the bank would have released the secured funds to the debtor in the absence of a court order.

[2] Remarkably, according to the debtor's schedules, the debtor's total monthly income of $2230.00 is identical to his total monthly expenses of $2230.00.

despite operating his business under the name of Greg's Seamless Guttering, having a bank account in the name of Greg's Seamless Guttering, and having a judgment against him d/b/a Greg's Seamless Guttering.

12. The Disclosure of Compensation of Attorney For Debtor, which was signed by the debtor and Steve Westerfield, discloses that Westerfield agreed to accept $1350.00 for his services and "Prior to the filing of this statement I have received $1350.00." The statement is dated December 20, 2017. On November 29, 2017, one of the checks the debtor wrote on his Simmons account was to Steve Westerfield in the amount of $1500.00, a post-petition payment. If this payment was for Westerfield's compensation, Westerfield would have been a creditor in the debtor's bankruptcy case at the time the petition was filed and was not disclosed as such.

13. Steve Westerfield certified that he sent the schedules to "all creditors whose names and addresses are set forth on the following pages(s):" However, the only creditors listed below this statement were Laura Loveday and Santander Consumer USA, despite including a partial list of five additional unsecured creditors in the debtor's schedules and knowing that the state court judgment was in favor of Laura Loveday and David Loveday.

DISCUSSION

§ 727(a)(2)(B)

The debtor's actions concerning the undisclosed funds in his Greg's Seamless Guttering account at Simmons relate directly to the Lovedays' § 727(a)(2)(B) allegations. On the day the debtor filed his petition, he had in his Greg's Seamless Guttering bank account in excess of $11,000.[3] These funds were property of the debtor's estate at the time he filed his petition. *See* 11 U.S.C. § 541(a)(1). Based on a pre-petition Writ of Garnishment, the

[3] The testimony at trial was that the debtor had in excess of $14,000.00 in the account on the day he filed his petition. The balance on November 21, 2017–the day before he filed–was $14,411.67. The balance on November 22, 2017, was $11,178.30.

only creditor the debtor listed on his petition–Laura Loveday–had a security interest in those funds. Despite having the knowledge that the funds existed, the debtor concealed all but $4000.00 of the total deposit, later stating that the additional funds belonged to his "customers" or to pre-petition contractors (that were never listed on his schedules). After the funds were (mysteriously) released by Simmons shortly after the debtor's bankruptcy petition was filed, the debtor withdrew approximately $13,400.00 to pay the unlisted creditors, including his attorney, Steve Westerfield. None of these transfers are apparent from the debtor's petition, schedules, or statements.

The concealment and subsequent transfer by the debtor of the funds held by Simmons when the debtor filed his petition satisfies the first three elements required under § 727(a)(2)(B):

(1) the act complained of was done with property of the estate;

(2) the act was that of the debtor; and

(3) the act consisted of a transfer, removal, destruction, mutilation, or concealment of estate property.

The fourth element–intent–will be discussed below in the "Intent under § 727(a)(2) and (a)(4)" section.

§ 727(a)(4)(A)

The first element under § 727(a)(4)(A) requires that the debtors made a statement under oath. Debtors are required to verify their schedules and statements under the penalty of perjury. *Daniel v. Boyd* (*In re Boyd*), 347 B.R. 349, 355 (Bankr. W.D. Ark. 2006). "Statements made by a debtor in his bankruptcy schedules, his personal statement of financial affairs, and at 341 meetings are all statements made under oath." *Hughes v. Hughes* (*In re Hughes*), 490 B.R. 784, 791 (Bankr. E.D. Tenn. 2013) (citations omitted). In this case, the Court finds that the debtor signed his petition, schedules, and SOFA

under oath and penalty of perjury.[4]

The second element requires that a statement that the debtors made under oath was false. Based on the Court's findings enumerated above, the Court finds that the second element has also been met.

The third and fourth elements–that the statement was made with fraudulent intent and the debtor knew the statement was false–will be discussed below in the "Intent under § 727(a)(2) and (a)(4)" section.

Finally, in order to warrant the denial of the debtors' discharge under § 727(a)(4)(A), the debtor's false statements must be material to his bankruptcy case. *In re Richmond*, 429 B.R. at 307. "A false statement is material if it 'bears a relationship to the [debtor's] business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of [his] property.'" *Jacoway v. Mathis* (*In re Mathis*), 258 B.R. 726, 736 (Bankr. W.D. Ark. 2000) (quoting *Mertz v. Rott*, 955 F.2d 596, 598 (8th Cir. 1992)). "The value of omitted assets is relevant to materiality, but materiality will not turn on value." *In re Sears*, 246 B.R. 341, 347 (B.A.P. 8th Cir. 2000) (citation omitted). "Nondisclosure of an asset of relatively modest value, or a false recitation as to it, can still be considered 'material,' as long as the asset became property of the bankruptcy estate by operation of 11 U.S.C. § 541(a)." *Bernhardt v. Radloff* (*In re Radloff*), 418 B.R. 316, 322 (Bankr. D. Minn. 2009) (citing *Mertz*, 955 F.2d at 598). Again, based on the Court's findings enumerated above, the Court finds that the fifth element has also been met.

---

[4] Although the debtor repeatedly testified that "/s/ Gregory D. Dickerson" was not his signature, this Court recognizes a "/s/" followed by the name of the signatory to substitute for an original signature. By using the "/s/" designation, the attorney who files the pleading retains the originally executed document for no less than three years after a case has been closed. *Admin. Procedures for Elec. Filed Cases and Related Documents*; U.S. Bankr. Ct. for the E. and W. Dist. of Ark.; Ver. 7.2, June 27, 2016.

Intent under § 727(a)(2) and (a)(4)

Both subsection (a)(2) and (a)(4) have an intent to defraud element. Proving the requisite actual intent to defraud a creditor with direct evidence is hard. Therefore, fraudulent intent may be '"inferred from the facts and circumstances of the debtor's conduct."' *In re Korte*, 262 B.R. at 472-73 (quoting *Fox v. Schmit* (*In re Schmit*), 71 B.R. 587, 590 (Bankr. D. Minn. 1987)). Even if a debtor is merely careless, the '"cumulative effect of all the falsehoods together evidences a pattern of reckless and cavalier disregard for the truth to support fraudulent intent."' *Sholdra v. Chilmark Fin. LLP* (*In re Sholdra*), 249 F.3d 380, 382-83 (5th Cir. 2001) (quoting *Economy Brick Sales, Inc. v. Gonday* (*In re Gonday*), 27 B.R. 428, 432 (Bankr. M.D. La. 1983)). Therefore, reckless indifference to the accuracy of the information provided in a debtor's schedules and statements is sufficient to prove intent. *In re Richmond*, 429 B.R. at 298.

The debtor's petition and schedules are replete with reckless indifference to the accuracy of the information. At no time did the debtor ever disclose that he was a sole proprietor despite having a business that grossed over $360,000.00 in 2017 and despite having a judgment entered against him d/b/a Greg's Seamless Gutters a month earlier. In fact, viewing the documents in isolation, one would not be able to tell that the debtor was anything more than a person working for wages, commissions, bonuses, and tips. Further, he failed to disclose a garnishment that was less than two weeks old. And even if the debtor "forgot," his bankruptcy attorney is the same attorney that represented the debtor in the state court action and who was also served with the Writ of Garnishment. Had the Debtor disclosed all of the funds that were in his Simmons's accounts, Loveday presumably could have either recovered the money as a secured creditor had she been entitled to it or, at a minimum, shared in the distribution of the money to other unsecured creditors–unsecured creditors (including Westerfield) who were not even listed in the schedules that were finally filed despite the Court granting an extension so that the debtor could allegedly collect "a list of all creditors' addresses and account numbers."

Further, by filing an initial chapter 13 petition, the debtor avoided the scrutiny of a

chapter 7 trustee while disposing of his assets by paying those unlisted creditors, to the detriment of the only creditor he disclosed on his petition. Based on the debtor's actions and lack of disclosure, the Court finds that the debtor had the requisite intent to defraud the only creditor listed on his petition.

For the reasons stated above, the Court finds that Laura and David Loveday proved each element of § 727(a)(2)(B) and § 727(a)(4)(A) by a preponderance of the evidence. Therefore, the Court grants the Lovedays' complaint and denies the debtors' discharge under § 727(a)(2)(B) and § 727(a)(4)(A). As a result, the Court does not reach the Lovedays' allegations under § 727(a)(3). The Lovedays have also requested (for the first time at trial and without reason) that the Court place a five-year bar on the debtor refiling a bankruptcy petition. The Court denies this request. Section 523(a)(10) states that any debt that was or could have been listed in a previous bankruptcy case in which the debtor was denied a discharge is non-dischargeable in a subsequent case without regard to a time limit. 11 U.S.C. § 523(a)(10). The import of this statutory provision is that the debtor will not be able to discharge the Lovedays' judgment in a subsequent case, even if the debtor attempts to dismiss the current case.

IT IS SO ORDERED.

Ben Barry
United States Bankruptcy Judge
Dated: 11/05/2018

cc: Walden M. Cash
Ryan J. Applegate
Steve Westerfield
Greg Dickerson
Laura and David Loveday
U.S. Trustee