UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re

Case No. 8:00-bk-6417-KRM

RAYENA M. SANDELL,

Debtor.

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WESTFIELD INSURANCE CO.,

Plaintiff,

vs.

Adversary No. 03-697

RAYENA M. SANDELL,

Defendant.

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ANDREA P. BAUMAN,

Third Party Plaintiff,

vs.

WESTFIELD INSURANCE CO., and
RAYENA M. SANDELL,

Counter-Defendants.

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MEMORANDUM OPINION

In 2002, nearly two years after her Chapter 7 case was closed, the debtor made a claim against Westfield Insurance Company ("Westfield") arising from a theft of seven items of jewelry valued at up to $39,268.00. In the subsequent investigation, the debtor initially told the insurer that she had owned the jewelry since before 1985; but she did not disclose the bankruptcy case. The insurer later discovered that the debtor had listed only $40.00 of jewelry in her bankruptcy case. Westfield ultimately denied the claim, alleging that the debtor's misrepresentations voided the insurance coverage.

In this declaratory judgment action, Westfield seeks a ruling that it has no obligation to pay the claim; alternatively, if it has to pay, Westfield seeks a determination of whether the debtor or her Chapter 7 trustee is the proper payee.[1] The Chapter 7 trustee intervened to assert her interest in all of the debtor's stolen jewelry and in any insurance proceeds paid on the claim. The trustee also asserts an interest in five other items of jewelry that were scheduled on the insurance endorsements, but were not stolen.

After considering the evidence presented at trial, including the testimony of the debtor and Westfield's investigator, and the parties' post-trial memoranda, and for the reasons stated below, the Court concludes that: the debtor had an undisclosed interest in the stolen jewelry at the time her Chapter 7 case was filed; the trustee is entitled to recover the value of the jewelry which the debtor owned on the petition date; but the trustee is not entitled to recover the value of the other, non-stolen jewelry; and the debtor's misrepresentations about her ownership of the jewelry during her bankruptcy case were material and therefore sufficient to void the insurance policy.

BACKGROUND

On April 26, 2000, the debtor filed a petition for relief under Chapter 7, which was administered as a no-asset case.[2] She listed $1,330.00 of personal property including three items of jewelry (gold earrings, a watch and a gold wedding band) stated to have a total value of only $40.00.

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[1] The debtor was granted a discharge on August 3, 2000, and her Chapter 7 case was closed on October 26, 2000. The case was reopened, on Westfield's motion, on October 8, 2003. The Court has jurisdiction pursuant to 28 U.S.C. Sections 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. Section 157(b)(2)(A). This Opinion and Order constitutes findings of fact and conclusions of law made pursuant to Federal Rule of Bankruptcy Procedure 7052.

[2] In her schedules, the debtor listed assets totaling $161,830, including $160,500 for her exempt homestead and $1,330 of personal property.

On October 24, 2002, nearly two years after the Chapter 7 case was closed, seven articles of jewelry, valued by the debtor at $39,268, were stolen from her home. The debtor filed a claim for up to $39,268.00 under her homeowner's policy.

The debtor's homeowner's policy was issued by Westfield in 1995, initially providing for only $4,000.00 in general coverage for all jewelry. After her Chapter 7 case was concluded, the debtor augmented her coverage by obtaining endorsements for replacement coverage for one item of jewelry in December of 2000, and another eight items on August 9, 2002.

Four of the stolen pieces, having a value of about $24,790.00, were scheduled under the endorsements; the other three items were not scheduled and therefore only insured up to $4,000.00.

In her proof of loss, dated January 2, 2003, the debtor listed the seven stolen items, as follows:

Jewelry	Stated Value	Insurance
3 CT dia bracelet	$ 3,000	general*
3 CT dia bracelet	4,898	endorsement
Dia-sapphire ring	5,810	endorsement
Aqua, dia earrings	2,665	endorsement
Dia, ruby, emerald bracelet	11,395	endorsement
Dia necklace	3,500	general*
10 CT dia necklace	8,000	general*
	$ 39,268	

*limited to $4,000 total

Initially, the insurer was suspicious because the theft occurred less than ninety days after the debtor had enhanced the coverage. But, now there is no dispute that the seven items were actually stolen by a third party.[3]

Westfield eventually denied the debtor's claim. In a letter, dated July 17, 2003, the insurer stated, that: (1) the debtor had made intentional misrepresentations or concealed material facts thereby breaching the policy's concealment or fraud provision and voiding claim coverage; and (2) the debtor had failed to disclose her jewelry to the bankruptcy court.

Initially, in her proof of loss, the debtor stated that since the time the policy had been issued (1995), none of the stolen jewelry had changed ownership, possession or location. Similarly, during her initial recorded statement to Westfield's investigator, the debtor stated that all of the stolen jewelry was given to her, prior to 1985, by her deceased former husband.

On January 6, 2003, Westfield's investigator asked the debtor about her 2000 bankruptcy case and the reason for listing only $40.00 of jewelry. The debtor explained that she did not list the jewelry in the Chapter 7 because her lawyer had told her that "they would take her jewelry." On January 29, 2003, however, the debtor telephoned the investigator to explain that she did not own the stolen jewelry when she filed her Chapter 7 petition; that the jewelry had previously been sold to her two sisters and a niece. The debtor explained that after the bankruptcy case was concluded the jewelry was given back to her as "birthday gifts," at various times between January and May 2002.

On April 14, 2003, the debtor submitted to an Examination Under Oath ("EUO") conducted by Westfield. She elaborated on the sales of the jewelry to her family members: she had sold the jewelry because she was in desperate need of money; one piece was purchased by a niece for $1,500 in a lump sum, but the other pieces were sold to her sisters in exchange for irregular payments over time, without any documentation as to how much would be paid. The sisters and the niece later provided affidavits to the insurer stating that they had given the jewelry back to the debtor in 2002 as birthday gifts; but each affidavit states that all "debt" is "forgiven."[4]

DISCUSSION

The debtor's insurance policy includes a "Concealment or Fraud" provision: "the entire policy will be void if, whether before or after a loss, and insured has: (a) intentionally concealed or misrepresented any material fact or circumstance; (b) engaged in fraudulent conduct; or (c) made false statements; relating to this insurance."

[3] It appears that the jewelry was stolen by a "boarder" who resided in the debtor's home.

[4] The affidavit of the debtor's niece, who paid $1,500 is more specific: "the debt of $1,500.00 was forgiven at that time [when the bracelet was returned in May 2002]."

A "concealment or fraud" provision is enforceable. See Chaachou v. American Central Ins. Co., 241 F.2d 889, 892 (5th Cir. 1957); Lopes v. Allstate Indem. Co., 873 So.2d 344 (Fla. 3d DCA 2004); Wong Ken v. State Farm Fire & Cas. Co., 685 So.2d 1002, 1003 (Fla. 3d DCA 1997). An intentional, material misrepresentation relating to a claim voids the coverage under a policy containing such provision. Id. A misrepresentation is material if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented. Long v. Insurance Co. of North America, 670 F.2d 930 (10th Cir. 1982).

The law in the Eleventh Circuit is clear that an insured has an affirmative obligation to comply with the conditions of the policy, including the "concealment or fraud" provision. See Michigan Millers Mut. Ins. Corp. v. Benfield, 140 F.3d 915, 922-923 (11th Cir. 1998); Chaachou v. American Central Ins. Co., 241 F.2d 889, 892 (5th Cir. 1957).[5]

In the present case, the debtor owned the same pieces of jewelry before and after her Chapter 7 case. Paragraph 4 of the debtor's proof of loss asks if there were any changes in ownership since the policy was issued. The debtor stated "none." The debtor later contradicted this assertion by explaining that she had sold the jewelry to relatives prior to 2000. The debtor's explanation that she did not own the jewelry on the petition date is not credible.[6]

The debtor initially admitted to Westfield's investigator that she did not schedule the jewelry because she understood that it would then be taken away from her by the trustee. Apart from the issue of the falsity of the bankruptcy schedules, this statement is an acknowledgment that the debtor owned the jewelry on the petition date.

There is no documentation evidencing any sales. The payments received by the debtor were made in cash or by checks made out to "cash." One of the checks, from the debtor's sister in the amount of $40.50, includes the notation that $10.00 is for the payment of a telephone bill. Each of the affidavits submitted by the relatives characterizes the payments that the debtor received as loans: each of the "purchasers" state that when they returned the jewelry to the debtor, the "debt" was "forgiven."

There are contradictions in the debtor's explanation that make her version of events not believable. The debtor testified that she was "desperate" and needed money to avoid bankruptcy; yet, instead of selling the jewelry for lump sums of cash, she gave the jewelry to her relatives in exchange for relatively small payments made from time to time thereafter.

There are other inconsistencies in the debtor's explanation to Westfield. The diamond earrings, claimed to be worth nearly $3,000, were supposedly "repaired" by a Sarasota jeweler after having been purchased by the debtor's sister, a California resident. The sales ticket, dated July 23, 1999, identifies the debtor as the customer and describes the work, not as a repair, but as "custom make, square gold design."

It is a reasonable inference, from the entire record that either (1) the alleged transfers to the debtor's sisters and niece were made for purposes of collateralizing family loans that were later "forgiven" or (2) the transfers never occurred at all. Accordingly, the Court concludes that the debtor owned the seven stolen pieces of jewelry on the Chapter 7 petition date.

There is no doubt, either, that the debtor intentionally misled Westfield about a material issue. The Court concludes that the debtor willfully acted to conceal from Westfield the fact that another person – her bankruptcy trustee – owned the jewelry for which she was making a claim. The debtor failed to disclose what interest, if any, her bankruptcy trustee may have in the jewelry or the insurance proceeds. The debtor held herself out as the only claimant, when in fact her bankruptcy trustee had a potential competing claim to the same insured assets.

Therefore, the insurance coverage is void as a result of the debtor's breach of the "concealment or fraud" provision. Westfield has no obligation to pay the claim amount to the debtor or to the trustee, who has no legal or beneficial

[5] Both cases held that the insurer does not have to prove reliance on the misrepresentation to have the policy voided under a "concealment or fraud" provision.

[6] The Court bases this conclusion on the demeanor of the debtor at trial and on the inherent conflicts in her explanation.

interest in the policy itself.[7] Nevertheless, the trustee is entitled to recover the value of the stolen jewelry from the debtor.

The Court will deny, however, the trustee's claim for turnover of the five other pieces of jewelry that were specially endorsed after the Chapter 7 case was concluded, but were not stolen. There is no evidence to establish that any of these items were owned by the debtor on the petition date: the debtor's explanation that these pieces of jewelry were given to her by a boyfriend after the petition date was not rebutted. Accordingly, the Trustee's demand for turnover of the watch and diamond earrings, which are still in the debtor's possession, and for turnover of $3,900.00, which represents the proceeds the debtor received from the sale of the other three items, is denied.

CONCLUSION

The Court concludes that on the filing of her bankruptcy case, the debtor owned the jewelry that was later stolen. There was an active effort by the debtor to provide Westfield with a version of events that would result in her receiving both the benefit of keeping her jewelry during her bankruptcy and later claiming the insurance proceeds. Considering the nature of the misrepresentations, it is evident that it was made to deceive Westfield as to the validity of the debtor's insurable interest. The debtor failed to comply with her obligations under the concealment or fraud provision of the insurance policy. Accordingly, the debtor's insurance policy, as to her claim regarding entitlement to compensation as a result of the theft, is void. Accordingly, final judgment will be entered in favor of Westfield Insurance Company by separate order.

Final judgment for the trustee's demand for turnover of the value of the stolen jewelry will be entered after determination, at a later date, of value of the items of jewelry that were owned pre-petition as these items were undisclosed assets of the estate.

[7] This is not a case of judicial estoppel – where a debtor's misrepresentations are alleged to be binding on a bankruptcy trustee. See Parker v. Wendy's Intl'l, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004) (stating debtor's failure to list an interest on a bankruptcy schedule leaves that interest in the bankruptcy estate). Nor is the trustee an "innocent" co-insured. Here, the trustee has no interest in the policy itself. See 11 U.S.C. § 365(d)(1).

DONE and ORDERED in Tampa, Florida, this 9th day of June, 2005.

K. RODNEY MAY
United States Bankruptcy Judge

Certificate of Service

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