

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

In re:

Case No. 02-13668-8G7

ALISON HANNA HELMKAMP,

Debtor.

Chapter 7

MEDICAL ASSOCIATES OF PINELLAS, LLC,

Plaintiff,

vs.

Adv. No. 02-941

ALISON HELMKAMP,

Defendant.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND MEMORANDUM OPINION**

THIS CASE came before the Court for a final evidentiary hearing to consider the Complaint Objecting to Discharge of Debtor filed by the Plaintiff, Medical Associates of Pinellas, LLC.

In the Complaint, the Plaintiff asserts that the discharge of the Debtor, Alison Hanna Helmkamp, should be denied pursuant to §727(a)(2) of the Bankruptcy Code, because the Debtor transferred property within one year prior to the filing of her bankruptcy petition with the intent to hinder, delay, or defraud creditors. The Plaintiff also asserts that the Debtor's discharge should be denied pursuant to §727(a)(4) of the Bankruptcy Code, because she knowingly and fraudulently made false oaths in connection with the case.

In response, the Debtor acknowledges that she made certain transfers within the year prior to filing, but contends that such transfers or payments were made for legitimate and proper purposes, and not with the intent to hinder or defraud creditors. Additionally, the Debtor acknowledges that certain inaccuracies may appear in her bankruptcy schedules and statement of affairs, but that the errors were inadvertent and not material to the chapter 7 estate.

Background

The Debtor is a doctor of osteopathy specializing in internal medicine. (Transcript, pp. 12, 16). She owns 100 percent of the stock of Alison Hanna Helmkamp, D.O., P.A. (Transcript, p. 77).

On March 5, 2002, the Plaintiff's attorney wrote a letter to the Debtor's attorney stating that the Debtor owed the Plaintiff in excess of \$245,000.00, and that the Plaintiff would initiate litigation if the debt was not settled. (Plaintiff's Exhibit 2).

The Debtor met with her attorney on April 10, 2002, and discussed the filing of a bankruptcy petition as an alternative to contesting the Plaintiff's claim. (Transcript, p. 32). At that meeting, the Debtor and her attorney discussed the concept of exempt assets, including Florida's homestead exemption. (Transcript, p. 66). The Debtor and her attorney entered into a "Contract for Legal Representation (Bankruptcy - Chapter 7)" on April 12, 2002. (Plaintiff's Exhibit 4).

On April 30, 2002, the Plaintiff filed a Complaint against the Debtor in the Circuit Court for Pinellas County, Florida. (Plaintiff's Exhibit 9). In the Complaint, the Plaintiff demanded judgment against the Debtor for an amount exceeding \$244,442.00. The Debtor was served with a copy of the Complaint on May 1, 2002. (Plaintiff's Exhibit 10).

On May 14, 2002, the Debtor wrote a check to Wee Care, the facility that cared for the Debtor's child, in the amount of \$1,204.00. The check constituted a prepayment for childcare services for the

seven-week period extending from the date of the check through the month of June, 2002. (Plaintiff's Exhibit 12, Transcript, pp. 45-46, 49).

Additionally, in the seven-day period between May 14, 2002, and May 20, 2002, the Debtor made the following expenditures for landscaping supplies and other improvements to her home:

1. May 14, 2002 - the sum of \$2,500.74 to Home Depot for patio tile. (Plaintiff's Exhibit 17; Transcript, pp. 55-56).
2. May 16, 2002 - the sum of \$735.60 to Wingate Supply for lava rock. (Plaintiff's Exhibit 15; Transcript, p. 51).
3. May 20, 2002 - the sum of \$588.41 to Weber Plants for landscaping supplies. (Plaintiff's Exhibit 15; Transcript, p. 52).
4. May 20, 2002 - the sum of \$419.88 to "3908 West Hillsborough" for landscaping supplies. (Plaintiff's Exhibit 15; Transcript, p. 52).

The landscaping purchases during this one-week period, therefore, total the sum of \$4,244.63.

The source of the funds was the Debtor's savings account.

The Debtor signed her bankruptcy schedules approximately one month later, on June 21, 2002. On her "Schedule B - Personal Property," the Debtor did not list any interest in any retirement plans, and also did not list any stock interest in any corporations or businesses. The only creditor listed by the Debtor on "Schedule F - Creditors Holding Unsecured Nonpriority Claims" was the Plaintiff.

The petition was filed on July 15, 2002.

Discussion

The Plaintiff contends that the Debtor's discharge should be denied pursuant to §727(a)(2) of the Bankruptcy Code, because she transferred property within one year prior to the filing of her bankruptcy petition with the intent to hinder, delay, or defraud creditors. The Plaintiff also contends that her

discharge should be denied pursuant to §727(a)(4) of the Bankruptcy Code, because she knowingly and fraudulently made false oaths in connection with her case.

A. Section 727(a)(2)

Section 727(a)(2) of the Bankruptcy Code provides as follows:

11 U.S.C. § 727. Discharge

(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). To prevail under §727(a)(2)(A), a creditor must prove four elements: "(1) that a transfer occurred; (2) that the property transferred was the property of the Debtor; (3) that the transfer was made within one year of the date of the filing of the petition; and (4) the Debtor had the intent at the time of the transfer to hinder, delay, or defraud a creditor." In re Fieser, 248 B.R. 648, 650 (Bankr. M.D. Fla. 1999).

The Debtor generally acknowledges that the first three of the required elements are present in this case. Consequently, as in Fieser, the only issue is whether the Debtor had the intent to hinder, delay, or defraud creditors at the time that she transferred her property. In re Fieser, 248 B.R. at 650.

It is well-established that the type of intent contemplated by §727(a)(2) is actual intent, and that constructive intent is not sufficient to satisfy the statute. It is also well-established, however, that a debtor's actual intent may be ascertained from the totality of the circumstances, and does not have to be

proven by direct evidence. In re Fieser, 248 B.R. at 651. "The general facts surrounding a case are key instruments used to gauge intent because an individual's intent is seldom admitted to and is difficult to prove." In re Bernier, 282 B.R. 773, 781 (Bankr. D. Del. 2002).

Courts generally look to several common factors to determine whether a debtor has the requisite intent under §727(a)(2). These factors include (1) whether the debtor retained possession, benefit, or use of the property at issue; (2) whether the debtor engaged in a pattern or series of transactions after the onset of financial difficulties; and (3) whether the chronology of the events and transactions evidences the debtor's intent to defraud. In re Dennis, 330 F.3d 696, 702 (5th Cir. 2003). "[O]ther factors indicative of an actual intent to hinder or delay a creditor are: whether the transaction is conducted at arm's length; whether the debtor is aware of the existence of a significant judgment or over-due debt; whether a creditor is in hot pursuit of its judgment or claim and whether the debtor knows this; and the timing of the transfer relative to the filing of the petition." In re Bernier, 282 B.R. at 781.

In this case, the Court finds that the Debtor made transfers of her property with the intent to hinder, delay, or defraud the Plaintiff within the meaning of §727(a)(2)(A) of the Bankruptcy Code.

The specific transfers upon which this conclusion is based are (1) the Debtor's prepayment on May 14, 2002, for more than six weeks of childcare services, and (2) the Debtor's purchase in May of 2002 of patio tile and other landscaping supplies for her home (collectively, the Transfers).

In finding the requisite intent, the Court was persuaded by the following facts:

1. The Transfers were made after the Debtor had been informed of the Plaintiff's claim, and within three weeks after being served with the Complaint that was filed against her in Pinellas County.

2. The Transfers were made after the Debtor had consulted with her attorney regarding filing a chapter 7 bankruptcy case. Specifically, the Debtor met with her attorney on April 10, 2002, and entered into a "Contract for Legal Representation" on April 12, 2002. The services that the attorney was to provide under the Contract consisted of filing the Debtor's chapter 7 petition and representing her in the bankruptcy proceeding.

3. The Debtor acknowledges that she and her attorney discussed the exemptions that are available to chapter 7 debtors at the meeting on April 10, 2002, and that she was aware that a debtor's homestead may be claimed as exempt.

4. The Transfers occurred only four weeks before the Debtor signed her bankruptcy schedules, and only two months before the Chapter 7 petition was filed.

5. The source of the funds used to make the Transfers was the Debtor's savings account. Specifically, the Debtor's savings account contained the sum of \$10,092.27 on April 25, 2002. (Plaintiff's Exhibit 16; Transcript, p. 42). In the nine-day period beginning on May 8, 2002, and ending on May 17, 2002, the Debtor made a series of transfers from the savings account to various checking accounts. As a result of those transfers, the savings account was reduced from the sum of \$10,092.27 to the approximate sum of \$600.00. (Plaintiff's Exhibit 16; Transcript, pp. 42-43). The Debtor thereafter used at least a portion of the funds that had been transferred to the checking accounts to make the Transfers for prepaid childcare services and "for capital improvements on the house." (Transcript, p. 43). The effect of the Transfers, therefore, was the depletion of a liquid, nonexempt asset (the savings account) that would have been available to creditors in the chapter 7 case filed just two months later.

6. Although the aggregate amount of the Transfers (\$5,448.63) may be relatively small by some standards, the amount is significant in relation to the assets that will be recovered by the chapter 7 Trustee in this case. It appears, for example, that the Trustee is recovering only \$3,442.00 on account of the nonexempt portion of the Debtor's personal property. (Doc. 35, Order Granting Trustee's Motion to Compel Debtor to Turnover Property of the Estate). Accordingly, the amount of the Transfers is significant in proportion to the size of the estate.

7. The Transfers were unusual transactions for the Debtor. The Debtor conceded, for example, that she normally paid the childcare facility for its services on a weekly basis, and that she had never paid the facility for more than one week in advance prior to the Transfer (seven-week prepayment) on May 14, 2002. (Transcript, pp. 46, 49). Additionally, the Debtor acknowledged that she had not spent more than \$200 for landscaping and home improvement supplies prior to her purchase of \$4,244.63 worth of materials in May of 2002. (Transcript, p. 59). Consequently, the Transfers were

unusual transactions for the Debtor, and not consistent with her normal spending practices.

8. Although the petition was signed on June 21, 2002, it was not filed until July 15, 2002. The Debtor could not explain this delay. (Transcript, p.74). By July 15, 2002, it is likely that the pre-payment credit for child care would have been used, so that transfer may have had no effect on the bankruptcy estate. The transfer does, however, indicate the intent of the Debtor in making the unusual transfers in May, 2002, which depleted her savings account and did have an effect on the bankruptcy estate.

Based on all of these facts construed together, the Court finds that the Debtor made the Transfers with the intent to hinder, delay, or defraud a creditor within the meaning of §727(a)(2)(A) of the Bankruptcy Code, and that the Debtor's discharge should therefore be denied.

Finally, the Plaintiff also presented evidence regarding the Debtor's attendance at a medical conference in the Florida Keys in May of 2002. The Debtor paid for her meals and the lodging associated with the conference from her personal funds. The Court finds, however, that these expenses were not paid with the intent to hinder, delay, or defraud creditors. The conference is directly related to the Debtor's continuing medical education, as required for the Debtor's profession, and the Debtor enrolled for the course in February of 2002, prior to the other material events in this case.

B. Section 727(a)(4)

The Plaintiff also asserts that the Debtor's discharge should be denied pursuant to §727(a)(4) of the Bankruptcy Code. Section 727(a)(4) provides as follows:

11 U.S.C. § 727. Discharge

(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). This section is "designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction." In re Wallace, 289 B.R. 428, 433 (Bankr. N.D. Okla, 2003). The section "serves the purpose of providing reliable information to those with an interest in the bankruptcy estate, who are entitled to a truthful statement of the debtor's affairs." In re Perry, 252 B.R. 541, 549 (Bankr. M.D. Fla. 2000).

To prevail under §727(a)(4)(A), a creditor must show that "(1) Debtor made a statement under oath, (2) such statement was false, (3) Debtor knew the statement was false, (4) Debtor made the statement with fraudulent intent, and (5) the statement related materially to the bankruptcy case." In re Perry, 252 B.R. at 549.

"Omissions from a debtor's sworn statement of affairs or schedules provide grounds for denying discharge." In re Perry, 252 B.R. at 549. "A statement contained in a debtor's schedules or statement of affairs, or the omission of assets from the same may constitute a false oath for purposes of § 727(a)(4)." In re Wallace, 289 B.R. at 434.

The Debtor concedes that false statements appear in her bankruptcy schedules. The two-fold issue for purposes of this adversary proceeding, therefore, is whether she made the statements with fraudulent intent, and whether the statements are material to the bankruptcy case.

In this case, the Debtor acknowledges that she owned 100 percent of the stock of Alison Hanna Helmkamp, D.O., P.A. on the date that she filed the chapter 7 petition, and that she did not list the stock ownership on her Schedule of Assets. (Transcript, p. 77). However, the Debtor listed all of the assets of her medical practice. (Transcript, pp. 109, 110). On Schedule B, the Debtor attached a

listing of the physical assets of her practice, and also attached a summary of the accounts receivable. Additionally, on Schedule B she disclosed her business checking account and its balance.

The Debtor also acknowledges that she owned an interest in two retirement accounts on the date that she filed the bankruptcy petition, and that she did not list these interests on her schedules. (Transcript, p. 78). Specifically, the Debtor was the owner of a S.T.A.R. Retirement Plan that had an account balance of \$4,990.46 as of March 31, 2002 (Plaintiff's Exhibit 18), and an Individual Retirement Account with AIG FSC Securities Corporation that had an account balance of \$16,447.79 as of June 28, 2002, and an account balance of \$14,814.43 as of July 31, 2002 (Plaintiff's Exhibits 19 and 21). She testified that she believed she had not participated in the S.T.A.R. plan long enough to have an interest in it, and further that she disclosed the AIG plan at the meeting of creditors. (Transcript, p. 107).

Finally, the Debtor acknowledges that she was paying approximately \$345 per month to lease a 1999 Toyota RAV-4 at the time that the petition was filed, and that she did not include the payment on "Schedule J - Current Expenditures of Individual Debtors." (Transcript, pp. 84-85). She did disclose the lease on Schedule G, however.

While there are inaccuracies in the Debtor's schedules, the Court does not find that the inaccuracies were made with the requisite fraudulent intent, or that the inaccuracies were material to the bankruptcy case.

The listing of all of the business assets demonstrates that the Debtor did not intend to conceal these assets, and such listing actually discloses her business more extensively than would the disclosure of the ownership of the corporate stock. The lease of the automobile was disclosed, and the failure to show the monthly payment on the schedule of current expenditures, while inaccurate, is not

material in this chapter 7 case. The Debtor did not believe she had an interest in the S.T.A.R. retirement account, and she disclosed the AIG retirement account at the meeting of creditors.

In the context of this case, the Court does not find that the failure to list these assets was accompanied by the necessary fraudulent intent or relative materiality to the bankruptcy case to require the Court to deny the discharge for this reason.

Conclusion

The Debtor's discharge should be denied pursuant to §727(a)(2) of the Bankruptcy Code. The Debtor made a prepayment for childcare services, and also purchased certain supplies for her home, shortly before the filing of her bankruptcy petition. These transactions constitute transfers of property of the Debtor, and were made with the intent to hinder, delay, or defraud creditors within the meaning of §727(a)(2) of the Bankruptcy Code. These transfers are small when compared to the debt alleged by the Plaintiff, and because of that disparity denial of the discharge seems to be an unfortunate result. However, such result is a consequence that the Bankruptcy laws require.

The discharge should not be denied for the Debtor's failure to disclose her ownership interest in her Professional Association, and her interest in certain retirement accounts, on her bankruptcy schedules. These inaccuracies were not accompanied by the requisite fraudulent intent or materiality that would require the Debtor's discharge to be denied pursuant to §727(a)(4) of the Bankruptcy Code.

Accordingly:

IT IS ORDERED that:

1. The discharge of the Debtor, Alison Hanna Helmkamp, is denied pursuant to §727(a)(2) of the Bankruptcy Code.

2. The discharge of the Debtor, Alison Hanna Helmkamp, is not denied pursuant to §727(a)(4) of the Bankruptcy Code.

3. A separate Final Judgment will be entered in this adversary proceeding in favor of the Plaintiff, Medical Associates of Pinellas, LLC, and against the Debtor, Alison Hanna Helmkamp.

DATED this _____ day of **OCT 10 2003**, 2003.

BY THE COURT



PAUL M. GLENN
Chief Bankruptcy Judge