

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

In re:

Case No. 3:10-bk-7287-PMG

VALERIE H. SHAW,

Debtor.

Chapter 7

GORDON P. JONES,
Chapter 7 Trustee,

Plaintiff,

vs.

Adv. No. 3:11-ap-95-PMG

VALERIE H. SHAW,

Defendant.

**ORDER ON MOTION TO DISMISS COUNT VI –
ACTION FOR REVOCATION OF DISCHARGE**

THIS CASE came before the Court for hearing to consider the Debtor’s Motion to Dismiss Count VI – Action for Revocation of Discharge.

The Debtor and the Trustee agree that the Debtor’s residential real property is property of the bankruptcy estate. In his Complaint, the Trustee alleges that the Debtor has not surrendered the property to the Trustee, and that the Debtor’s discharge should therefore be revoked pursuant to §727(d) of the Bankruptcy Code.

In response, the Debtor asserts that the claim should be dismissed, because she has not engaged in any fraudulent conduct as required by the statute for the revocation of a discharge, and because the Trustee's allegations do not otherwise state a claim under §727(d).

The Trustee's action to revoke the Debtor's discharge should be dismissed.

Background

The Debtor, Valerie H. Shaw, filed a petition under Chapter 7 of the Bankruptcy Code on August 20, 2010.

On her schedule of assets, the Debtor listed certain real property located in Jacksonville Beach, Florida (the Property). The Property is the Debtor's residence.

On her schedule of assets, the Debtor listed the value of the Property as \$300,000.00. On her schedule of liabilities, the Debtor listed Bank of America as holding a first mortgage on the Property in the amount of \$361,297.04.

The Debtor did not claim the Property as exempt.

On her Statement of Intention filed with the Chapter 7 petition, the Debtor indicated that she intended to surrender the Property. The mortgage is in default, and the automatic stay has been modified to permit the holder of the mortgage to proceed with its foreclosure action. (Main Case, Doc. 15).

The Debtor has continued to reside on the Property during her bankruptcy case, and intends to continue residing on the Property until the mortgage is foreclosed. (Doc. 13, Statement of Undisputed Facts, p. 4).

On October 12, 2010, the Trustee demanded in writing that the Debtor immediately vacate the Property.

On February 23, 2011, the Trustee filed a Complaint against the Debtor. The Complaint contains six Counts. Count I is an action for a declaratory judgment determining that the Property is property of the estate; Count II is an action to recover the value of the Debtor's postpetition use and occupancy of the Property; Count III is an action for damages for the Debtor's trespass on the Property; Count IV is an action to eject the Debtor from the Property; Count V is an action for damages for the Debtor's conversion of the Property; and Count VI is an action to revoke the Debtor's discharge pursuant to §727(d) of the Bankruptcy Code.

In Count VI, the Trustee alleges that the Debtor filed a Statement of Intention with her bankruptcy petition, and declared under oath that she intended to surrender the Property. The Trustee further alleges that the Debtor did not intend to surrender the Property at the time that she signed the Statement, and that she has "knowingly and fraudulently failed to surrender" the Property to the Trustee.

The Debtor has filed a Motion to Dismiss Count VI of the Complaint. Generally, the Debtor asserts that her Statement of Intention was designed only to indicate whether she intends to surrender the encumbered Property to the secured creditor, not to the bankruptcy trustee. According to the Debtor, she is performing her intention by acquiescing to the secured creditor's foreclosure action. Consequently, the Debtor asserts that neither her Statement nor her failure to turn over the Property to the Trustee were fraudulent, and that the Trustee's allegations are legally insufficient to support a claim to revoke her discharge under §727(d).

Discussion

The Debtor's discharge has not been entered. No objections to her discharge were filed by the deadline established pursuant to the Federal Rules of Bankruptcy Procedure, however, and the Trustee therefore brought the action under §727(d) in anticipation that a discharge would be granted. (Doc. 1, ¶ 20).

Section 727 governs the discharge of debtors in Chapter 7 cases. In this case, the Trustee seeks to revoke the Debtor's discharge pursuant to §727(d) of the Bankruptcy Code. Section 727(d) provides in part:

11 USC § 727. Discharge

...

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

11 U.S.C. §727(d). Actions to deny a debtor's discharge are generally construed in favor of the debtor and against the party opposing the discharge. Revoking a debtor's discharge under §727(d), therefore, is an extraordinary remedy that should be applied only in limited circumstances. In re Matos, 2008 WL 596744, at 1 (11th Cir.); In re Peterson, 356 B.R. 468, 475 (Bankr. N.D. Iowa 2006).

In this case, the Trustee's action to revoke the Debtor's discharge should be dismissed.

First, the discharge cannot be revoked pursuant to §727(d)(3). For revocation under that subsection, a debtor must have committed an act specified in §727(a)(6) of the Bankruptcy Code. Section 727(a)(6) provides for the denial of a debtor's discharge if the debtor has refused to obey a lawful order of the court. 11 U.S.C. §727(a)(6). In this case, no order has been entered requiring the Debtor to turn over the Property to the Trustee, and the Trustee has not identified any other order that the Debtor has refused to obey.

Second, the discharge cannot be revoked pursuant to §727(d)(2). For revocation under that subsection, a debtor must have acquired property of the estate, and fraudulently failed to report the acquisition or deliver the property to the trustee. Subsection 727(d)(2) "applies only to property acquired by a debtor *after* the petition." In re Shepard, 2011 WL 1045081, at 11 (Bankr. D. Md.)(citing In re DaMaia, 217 F.3d 838 (4th Cir. 2000))(Emphasis in original). See also In re Barnes, 2010 WL 1254876, at 3 (Bankr. N.D. Ala.)(Subsection 727(d)(2) addresses the "non-disclosure or non-delivery of property that a debtor gains possession of, or an interest in, *post-petition*.")(Emphasis in original). In this case, the Debtor did not acquire the Property postpetition. The Property was owned by the Debtor prepetition, was the Debtor's prepetition residence, and was disclosed on the Debtor's schedules filed with her bankruptcy petition.

Third, the discharge cannot be revoked pursuant to §727(d)(1). For revocation under §727(d)(1), a debtor must have obtained his discharge through fraud.

In order to revoke the debtor's discharge under §727(d)(1), the acts by the debtor must fit into one of the §727(a) exceptions to discharge had the facts been known and a complaint filed prior to the discharge. . . . Case law provides that the fraud required for a revocation of a discharge is fraud in fact or intentional misconduct by the debtor. A mistake of law or implied fraud is not sufficient.

...

The intentional omission of assets from the debtor's schedules has been found to qualify as grounds for revocation of a discharge under §727(d)(1).

In re Landry, 350 B.R. 51, 59 (Bankr. E.D. La. 2006). In re Scheffer, 2100 WL 2133226, at 3 (Bankr. D. Mass.)(To revoke a discharge under §727(d)(1), the trustee must show that “the fraud, if known, would have resulted in denial of discharge under §727(a) . . . The plaintiff must also show that the debtor obtained a discharge by committing actual fraud or fraud in fact, such as the intentional failure to schedule an asset of the estate.”).

In this case, the allegations in the Trustee's Complaint do not support a claim under §727(d)(1). The Debtor disclosed the Property on her schedules, and the estimated value and indebtedness scheduled for the Property were reasonable. The Debtor did not attempt to conceal the asset from the Trustee.

Additionally, the Debtor's completion of her Statement of Intention was not fraudulent. If a Chapter 7 debtor schedules a debt that is secured by property of the estate, §521(a)(2) of the Bankruptcy Code requires the debtor to file a statement of his intention with respect to retention or surrender of the property. 11 U.S.C. §521(a)(2). The reason for the requirement is to provide notice to the secured creditor of the debtor's intent regarding the creditor's collateral. In re Rodgers, 273 B.R. 186, 191 (Bankr. C.D. Ill. 2002). Section 521(a)(2) is designed “to give creditors information regarding their property without the hassle of having to reach the debtor's attorney or engage in unauthorized communications with a pro se debtor.” In re Irvine, 192 B.R. 920, 921 (Bankr. N.D. Ill. 1996)(quoting In re Bracamortes, 166 B.R. 160, 162 (Bankr. S.D. Cal. 1994)).

These cases indicate that a debtor's statement that he intends to surrender his residential real property is directed to creditors with a mortgage on the property, and has no effect on the trustee's administration of the estate. The statement is not intended to bind the trustee and, standing alone, does not show that the debtor engaged in actual fraud to obtain his discharge.

Finally, the Debtor's failure to surrender the Property to the Trustee does not warrant revocation of the Debtor's discharge under §727(d)(1). The amount of the secured debt on the Property exceeds its value, and the estate has no equity in the Property. In such cases, "it is generally recognized that abandonment is the appropriate method of dealing with the asset." In re Iuliano, 2011 WL 1627172, at 3 (M.D. Fla.)(citing In re Feinstein Family Partnership, 247 B.R. 502, 507-09 (Bankr. M.D. Fla. 2000)). In this case, the Debtor has filed a motion to compel the Trustee to abandon or administer the Property, and the Trustee has not alleged any specific instance in which the Debtor's failure to surrender the Property interfered with his ability to administer the estate.

Under these circumstances, the Court finds that the Complaint is insufficient to show that the Debtor obtained her discharge through fraud, or that her discharge would have been denied under §727(a) of the Bankruptcy Code had the facts been known earlier. Consequently, the Trustee has not sufficiently alleged that the Debtor's discharge should be revoked pursuant to §727(d)(1) of the Bankruptcy Code.

Conclusion

The Court finds that the Trustee did not adequately allege the elements required for revocation of the Debtor's discharge under §727(d)(1), §727(d)(2), or §727(d)(3) of the Bankruptcy Code. The Debtor disclosed the Property on her schedules, the Property is fully encumbered and subject to

foreclosure by the secured creditor, and the Trustee has not alleged any specific instance in which the Debtor's failure to surrender the Property interfered with his administration of the estate. Count VI of the Trustee's Complaint should be dismissed.

Accordingly:

IT IS ORDERED that the Debtor's Motion to Dismiss Count VI – Action for Revocation of Discharge is granted, and Count VI of the Complaint filed by the Trustee, Gordon P. Jones, is dismissed.

DATED this 1 day of July, 2011.

BY THE COURT

Paul M. Glenn

PAUL M. GLENN
Chief Bankruptcy Judge