UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO.: 3:04-bk-9532

In re:

NANCY S. TRETICK,

Debtor.
_____/

KENNETH A. SWANSON,

Plaintiff,

v.

ADV. NO.: 3:04-ap-395

NANCY S. TRETICK,

Defendant.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 20, 2004 Nancy S. Tretick ("Defendant") filed for Chapter 7 bankruptcy relief. On December 16, 2004 Kenneth A. Swanson ("Plaintiff") filed a Complaint seeking a denial of Defendant's discharge pursuant to 11 U.S.C. § 727 (count I) or in the alternative seeking an exception to the dischargeability of Defendant's debt to Plaintiff pursuant to 11 U.S.C. § 523(a)(5) (count II) or § 523(a)(15) (count III). The Court conducted a trial on August 25, 2005. At the conclusion of the trial, the Court granted summary judgment for Defendant on Count II of the Complaint, 11 U.S.C. § 523(a)(5). In lieu of oral argument, the Court directed the parties to submit memoranda on the remaining counts in support of their respective positions. Upon the evidence and the arguments of the parties, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Plaintiff and Defendant were married on November 14, 1991 in Duval County, Florida. On April 20, 2000 the Circuit Court for Duval County, Florida (the "Circuit Court") entered a Final Judgment of Dissolution of Marriage (the "Final Judgment of Dissolution") finalizing the parties' divorce.[1] The Final Judgment of Dissolution provided for a division of the parties' assets, liabilities and joint custody of their children. The Circuit Court ordered Defendant to deed her interest in the marital home to Plaintiff and pay Plaintiff $300.00 a month, three-fourths of the second mortgage payment.[2]

Plaintiff refinanced the second mortgage in July 2002. Defendant paid Plaintiff $300.00 a month until March 2003. Defendant included a note in the March 2003 payment stating that although she had agreed to pay three-fourths of the second mortgage for its 15-year term, the second mortgage term ended July 16, 2002, and therefore all future payments would end. Defendant testified in her deposition that she maintained the financial ability to pay Plaintiff but chose to terminate the payments because Plaintiff refinanced the loan.

On January 28, 2004 the Circuit Court entered Order on Motion to Enforce Final Judgment ordering Defendant to pay Plaintiff the balance of the debt.[3] On April 12, 2004 the Circuit Court entered Supplemental Order on Former Husband's Motion for Enforcement (the "Supplemental Order") ordering Defendant to pay Plaintiff $25,723.53 for Defendant's obligation on the second mortgage, interest on $25,723.53 as calculated with the applicable statutory interest rate and $487.50 for expert fees. The Supplemental Order gave Defendant ninety days to pay Plaintiff. Defendant failed to pay Plaintiff. On August 5, 2004 the Circuit Court entered Final Judgment against Defendant and in favor of Plaintiff in the amount of $25,723.53 for the balance of the second mortgage and $2,143.73 for interest.[4]

In April 2004, shortly after the Circuit Court entered the Supplemental Order, Defendant met with attorney Burney Bivens ("Bivens") to discuss bankruptcy. Defendant

[1] Both Plaintiff and Defendant remarried.
[2] The Circuit Court stated in its Order on Motion to Enforce Final Judgment that the parties incurred the second mortgage to pay off joint marital debt and Defendant's tuition.
[3] The Circuit Court reserved jurisdiction to determine the amount Defendant owed Plaintiff for her portion of the second mortgage, attorney's fees and costs.
[4] The Final Judgment did not mention expert fees.

met with Bivens again in July 2004 and retained him on August 17, 2004. As previously noted Defendant filed for bankruptcy relief on September 20, 2004. At trial Defendant testified that she filed bankruptcy because she could not pay her bills and her attorney's fees. However, Defendant did not list outstanding attorney's fees on her bankruptcy petition. Furthermore, Defendant is paying or has reaffirmed all of the debts listed on her Schedule F with the exception of the debt to Plaintiff.

Bankruptcy Schedules

Schedule B: Personal Property

Financial Accounts – B-2

On September 16, 2004, the day before Defendant signed her bankruptcy petition, the balance in her joint checking account was $1,723.09.[5] On September 17, 2004 Defendant signed her bankruptcy petition listing the balance in the joint checking account as $0. Defendant testified that she listed her joint checking account balance as $0 to account for checks she prepared shortly before filing bankruptcy. In fact the only outstanding check prepared by Defendant was a check in the amount of $195.09 written to the Home Depot on September 17, 2004. Additionally, on September 17, 2004, September 18, 2004 and September 20, 2004, Defendant or Tretick withdrew $300.00 daily from their joint checking account. Taking into account the outstanding check and withdrawals, the checking account balance on September 20, 2004 was $628.00.

Cash on Hand – B-1

Although Defendant stated on her Schedule B that she had no cash on hand when she filed her bankruptcy petition, Defendant could not explain at trial how she or Tretick spent the $900.00 in withdrawals and whether it was spent before she filed bankruptcy. Defendant's cash expenditures include a $4,000.00 payment to Big D's Nursery and Landscaping for plants, sod and tree removal on September 25, 2004. During Defendant's trial testimony she could not explain the origination of the $4,000.00 in cash. She simply testified that she did not have any cash around the time she filed bankruptcy.

Household Goods – B-4

On item B-4, household goods, Defendant listed a computer, a table and a hutch, which she collectively valued at $500.00. Defendant's Chapter 7 trustee hired an appraiser to appraise Defendant's assets. While at Defendant's house the appraiser observed the following goods which Defendant failed to include on her schedule B-4: 1) a thirty-gallon fish tank, 2) a dining table with six chairs, 3) clothing, 4) a cedar chest, 5) twenty-one pieces of glassware, 6) a sideboard or dresser with six drawers and 7) a sofa table. The appraiser valued Defendant's household goods at $2,120.00. Thereafter, Plaintiff contacted the trustee and informed him that Defendant also owned a treadmill and a commercial sewing machine. Defendant and Trustee agreed that the treadmill would be valued at $500.00 and the commercial sewing machine would be valued at $1,200.00.

Lastly, Defendant failed to list any jointly owned household goods on her bankruptcy petition despite the instructions for Schedule B stating that "[i]f debtor is married, state whether husband, wife, or both own the property by placing an 'H,' 'W,' 'J,' or 'C' in the column labeled 'Husband, Wife, Joint, or Community.'" OFFICIAL & PROCEDURAL BANKR., FORM 6, SCHEDULE B (2003). In fact Defendant and Tretick jointly owned a number of household goods which the appraiser valued at $6,940.00, thereby valuing Defendant's half interest in the joint assets at $3,470.00.

CONCLUSIONS OF LAW

Plaintiff objects to Defendant's discharge pursuant to 11 U.S.C. §§ 727(a)(4)(A) and 727(a)(5) or in the alternative seeks an exception to the discharge of Defendant's debt to Plaintiff pursuant to 11 U.S.C. § 523(a)(15).

Denial of Defendant's Discharge

The Bankruptcy Code favors discharge of the honest debtor's debts and provisions denying this discharge to a debtor are generally construed liberally in favor of the debtor and strictly against the creditor. See Cohen v. McElroy (In re McElroy), 229 B.R. 483, 487

[5] The checking account is the property of Defendant and her husband, Michael Tretick ("Tretick").

(Bankr. M.D. Fla. 1998). However, there are limitations on the right to a bankruptcy discharge. Federal Rule of Bankruptcy Procedure 4005 provides that the initial burden of proof on an objection to discharge lies with the plaintiff. FED. R. BANKR. P. 4005. However, once a plaintiff meets the initial burden, the debtor has the ultimate burden of persuasion. See Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 619 (11th Cir. 1984). That is, the debtor must bring forth "enough credible evidence to dissuade the court from exercising its discretion to deny the debtor's discharge based on the evidence presented by the objecting party." Law Offices of Dominic J. Salfi, P.A. v. Prevatt (In re Prevatt), 261 B.R. 54, 58 (Bankr. M.D. Fla. 2000).

§ 727(a)(4)(A)

Section 727(a)(4)(A) of the Bankruptcy code provides the following:

> (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).

The purpose of the false oath discharge exception is "to ensure that a debtor provides dependable information to those who are interested in the administration of the bankruptcy estate." Citrus & Chemical Bank v. Floyd (In re Floyd), 322 B.R. 205, 214 (Bankr. M.D. Fla. 2005) (citing In re Quimby, 313 B.R. 779, 783 (Bankr. N.D. Ill. 2004)) (quoting In re Costello, 299 B.R. 882, 899 (Bankr. N.D. Ill. 2003)). A creditor objecting to a discharge pursuant to § 727(a)(4)(A) has the burden of producing sufficient evidence "to give rise to a reasonable inference that the debtor failed to disclose information with the intent to hinder the investigation of the trustee and creditors." Prevatt, 261 B.R. at 59. The burden then shifts to the debtor to overcome the inference with credible evidence. Id. For a false oath to be considered material, it must be shown that "it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property." Chalik, 748 F.2d at 618 (citations omitted).

"Although a single omission is generally insufficient to support an objection to discharge, a series of omissions may create a pattern which demonstrates the debtor's reckless disregard for the truth." Jones v. Phillips (In re Phillips), 187 B.R. 363, 370 (Bankr. M.D. Fla. 1995) (citing In re Clawson, 119 B.R. 851 (Bankr. M.D. Fla. 1990)). From this pattern of behavior, fraudulent intent may be presumed. See id. (citing In re Sausser, 159 B.R. 352 (Bankr. M.D. Fla. 1993); In re Gipe, 157 BR. 171 (Bankr. M.D. 1993)).

Plaintiff contends that Defendant knowingly and fraudulently made false oaths or accounts on Schedule B-1, B-2, and B-4. Upon a thorough review of the evidence, the Court finds that Defendant's: 1) failure to list her correct checking account balance; 2) failure to list the possession of cash; 3) failure to provide a complete list of her sole assets; and 4) failure to list joint assets is material. Additionally, Defendant's series of omissions creates a pattern demonstrating her reckless disregard for the truth from which fraudulent intent may be presumed. The Court finds that Defendant did not present credible evidence to overcome the presumption of fraud. Defendant's bankruptcy schedules are riddled with omissions. A few omissions may be considered inadvertent, but numerous omissions become troublesome and difficult for the Court to overlook.

Defendant did not explain the disparity between her checking account balance and the amount listed on her bankruptcy schedules. Nor did Defendant explain the disposition of the $900.00 withdrawn from the account days before filing her bankruptcy petition.[6]

[6] A presumption of tenancy by entireties extends to bank accounts. Beal Bank, SSB v. Almand & Assoc., 780 So.2d 45, 58 (Fla. 2001). However, a debtor cannot successfully argue that omissions in a bankruptcy petition are not material because the assets are exempt. The Cadle Co. v. Leffingwell (In re Leffingwell), 279 B.R. 328, 350 (Bankr. M.D. Fla. 2002). "Property is not exempt by fiat of the debtor, but only through a process of compliance with statutory disclosures …" Id. (citing Carlucci & Legum v. Murray (In re Murray), 249 B.R. 223, 231 (Bankr. E.D. N.Y. 2000)). "Debtors have an absolute duty to report whatever interests they hold in property, even if they believe their assets are worthless or unavailable to the bankruptcy estate." Id. (citing In re Murray, 249 at 231). "It is therefore meaningless to say that [accurate] disclosure is not required because property is exempt. Property can only become exempt

Additionally, Defendant's statement that she had $0 cash on hand when she filed for bankruptcy is incredible. Defendant or Tretick possessed $4,000.00 in cash to pay Big D's Nursery and Landscaping for plants, sod and tree removal five days after filing for bankruptcy relief. If the cash belonged solely to her husband, Defendant could have signified that on her Schedule B by placing an "H" next to the $4,000.00 on her schedule. The only plausible explanation is that Defendant did in fact have cash on hand when she filed bankruptcy.

Finally, Defendant's failure to list numerous household goods owned both individually and jointly evidences her reckless disregard for the truth. Defendant failed to give a plausible explanation as to why she did not list all of her individually owned household goods on her Schedule B. Furthermore, Defendant's explanation that she did not list jointly owned household goods because she did not file bankruptcy with her husband is insufficient.

Having found that Defendant's discharge should be denied pursuant to § 727(a)(4)(A), the Court need not address § 727(a)(5) and § 523(a)(15).

CONCLUSION

The Court finds that Defendant exhibited a reckless disregard for the truth when completing her bankruptcy schedules sufficient to give rise to an inference of fraud. The burden shifts to Defendant to come forward with credible evidence to overcome that

inference. Defendant did not present credible evidence to overcome the explanation of the inference of fraud established by Plaintiff. Accordingly, the Court will sustain Plaintiff's objection to Defendant's discharge pursuant to § 727(a)(4)(A).

DATED this 4 day of January, 2006 in Jacksonville, Florida.

/s/ Jerry A. Funk
JERRY A. FUNK
United States Bankruptcy Judge

Copies furnished to:

Lance Cohen, Attorney for Plaintiff
Robert E. Lee, Attorney for Defendant

through a legal process that includes disclosure." In re Leffingwell, 279 B.R. at 350 (quoting In re Murray, 249 B.R. at 231) (citing In re Yonikus, 974 F.2d at 905).