2003 BNH 008 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Bk. No. 00-12808-MWV
Chapter 7

John J. Diamond, III,
Debtor

Premier Capital, Inc.,
Plaintiff

Adv. No. 01-1068-MWV

v.

John J. Diamond, III,
Defendant

Randall L. Pratt, Esq.
Attorney for Plaintiff

James Molleur, Esq.
Attorney for Defendant

MEMORANDUM OPINION

The Court has before it a six count complaint[1] brought by Premier Capital, Inc. ("Premier Capital"/"Plaintiff") against John J. Diamond, III ("Debtor/Defendant") seeking denial of the Debtor's discharge pursuant to section 727(a)(2)(A) and (4) of title 11 of the United States Code.[2] The Court held a two-day trial on August 28 and 29, 2002, and took the matter under advisement. For the reasons set forth below, the Court denies the Plaintiff's complaint.

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[1] All references to the complaint are to the Plaintiff's third amended complaint filed July 24, 2002. See Adv. Doc. 44.

[2] Unless otherwise noted, all statutory section references herein are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, *et seq*.

JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

FACTS

The Plaintiff is the holder of two notes executed by the Defendant in 1986 and 1987. The Defendant defaulted on the notes, and the Plaintiff obtained a judgment in the amount of $131,215.12 plus statutory interest and costs from the Strafford County Superior Court on May 6, 1999. The Defendant had been represented by Attorney Stanley J. Mullaney from May 20, 1998 to July 12, 2000. During this period, the parties attempted to settle the superior court matter without success. On or about January 20, 1999, the Defendant submitted to the Plaintiff an unsigned affidavit, which listed assets and liabilities of the Defendant (Pl. Ex. 10). The affidavit did not include the Defendant's ownership interest in two corporations, namely, Diafil, Inc. and Real Estate Settlement Services, Inc.

On or about June 1, 2000, the affidavit was resubmitted by Defendant's attorney to the Plaintiff, who was represented by different counsel. When the affidavit was resubmitted, the Defendant maintained accounts with Solomon Smith Barney in Portland, Maine, and held an insurance policy with Prudential that had a cash value of approximately $11,900. These assets were not specifically listed in the affidavit. On or about July 10, 2000, the Plaintiff obtained a trustee attachment, which was served on certain financial institutions, not including Solomon Smith Barney or Prudential. On or about July 18, 2000 to July 26, 2000, the Defendant liquidated the above-referenced assets and deposited the proceeds in Attorney Terrie Harman's trust account. Payments from this account were made to Attorney Harman for legal fees, to an accountant and to the Internal Revenue Service.

On October 6, 2000, the Defendant filed an original petition under Chapter 13 of the Bankruptcy Code, which was converted to Chapter 7 on October 24, 2000. On September 27, 2000, the Defendant was divorced from his wife, Kim. The divorce decree incorporated a permanent stipulation. Paragraph 15(B) of that stipulation awarded the Defendant's interest in Diafil, Inc. and Real Estate Settlement Services, Inc. to his wife. A final transfer of the stock certificate did not occur until after the filing of the bankruptcy petition. The bankruptcy petition showed the stock being transferred on September 27, 2000. Doc. 12, ¶ 10, Statement of Affairs.

Lastly, the Defendant is a real estate broker. At the time of the filing of the bankruptcy petition, he was acting as the broker on several transactions. The petition failed to list these transactions as executory contracts or as contingent commissions.

DISCUSSION

The first four counts of the complaint allege violations of section 727(a)(2) of the Bankruptcy Code. The last two counts are brought under section 727(a)(4). Section 727(a) provides in relevant part:

> (a) The court shall grant the debtor a discharge, unless —
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> ...
>
> (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; or
>
> (B) property of the estate, after the date of the filing of the petition.
>
> ...
>
> (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)(2) and (a)(4)(A).

> "Exceptions to discharge are narrowly construed in furtherance of the Bankruptcy Code's 'fresh start' policy," and, for that reason, the claimant must show that his "claim comes squarely within an exception enumerated in Bankruptcy Code § 523(a)." Century 21 Balfour Real Estate v. Menna (In re Menna), 16 F.3d 7, 9 (1st Cir. 1994); see In re Bajgar, 104 F.3d at 498 n. 1. The statutory requirements for a discharge are "construed liberally in favor of the debtor" and "[t]he reasons for denying a discharge to a bankrupt must be real and substantial, not merely technical and conjectural." Boroff v. Tully (In re Tully) 818 F.3d 106, 110 (1st Cir. 1987) (internal quotation marks omitted). On the other hand, we have noted that "the very purpose of certain sections of the law, like [§ 727(a)(2)], is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs." Id.

Palmacci v. Umpierrez (In re Umpierrez), 121 F.3d 781, 786 (1st Cir. 1997). Accordingly, the party seeking to deny a debtor's discharge under § 727(a) has the burden of establishing each element of discharge exception by a preponderance of evidence. See Rhode Island Depositors Econ. Prot. Corp. v. Hayes (In re Hayes), 229 B.R. 253, 259, n. 7 (B.A.P. 1st Cir. 1999); CIT Group/Sales Fin., Inc. v. Lord (In re Lord), 244 B.R. 196, 199 (Bankr. D.N.H. 1999).

A. COUNT I

Count I alleges that the Defendant's failure to lis

727.02[3][a] (15th ed. 2002). In deciding whether a debtor has acted with requisite intent to defraud, as required to deny his discharge based on prepetition transfer of assets, the Court must consider surrounding facts and circumstances and draw inferences as to actual intent from a debtor's actions. See Annino, Draper & Moore, P.C. v. Lang (In re Lang), 256 B.R. 539, 541 (B.A.P. 1st Cir. 2000). A determination concerning fraudulent intent depends largely upon an assessment of the credibility and demeanor of the debtor. See Watman, 301 F.3d at 8; Commerce Bank & Trust Co. v. Burgess (In re Burgess), 955 F.2d 134, 137 (1st Cir.1992) *overruled on other grounds by* Field v. Mans, 516 U.S. 59 (1995).

The Defendant, Mr. Diamond, testified at trial and the Court, having observed this witness, finds his testimony to be credible. During the periods in question, the Defendant testified that he was in a state of stress as a result of his son's substance abuse problem and his divorce. As to the affidavit, he testified that, since it was being prepared for the purpose of settlement negotiations, he included only assets that could readily be turned into cash. He did not believe that his ownership interest in the two closely-held corporations had any readily ascertainable value to a third party. The Court finds this explanation logical. Further, on July 21, 2000, counsel for the Defendant sent Plaintiff's counsel draft bankruptcy schedules, which clearly showed his ownership interest in the two entities. While this Court realizes that in most cases under section 727 actual intent must be inferred from the facts and circumstances that exist, the Court cannot find the requisite intent to hinder, delay or defraud a creditor from the Debtor's actions and hereby denies Count I.

B. COUNT II

Count II alleges that on or about June 1, 2000, the Defendant, with intent to hinder, delay or defraud the Plaintiff, concealed the Solomon Smith Barney accounts and the cash value of the Prudential insurance policy. This Count is also based on the unsigned January 1999 affidavit that was resubmitted to the Plaintiff in June of 2000. The affidavit does show, without detail, three retirement accounts, and it

was the Defendant's testimony that he thought the accounts that ended up at Solomon Smith Barney were retirement accounts. There is no insurance policy listed, but the evidence concerning the policy was from January 2000 forward, a year after the affidavit was prepared. Further, Exhibit 103 is a copy of the affidavit with notations that Attorney Mullaney testified were in his handwriting (Def. Ex. 103). One notation makes reference to the Prudential insurance policy, leading to the conclusion that the Defendant advised his counsel in some detail of the assets that were included in the affidavit. Attorney Mullaney testified he put the information into affidavit form and forwarded it to Attorney Peter Tamposi. Once again, the Court finds that there is insufficient evidence to indicate that the Defendant intended to conceal these assets. Count II is denied.

C. COUNT III

Count III alleges that during the period July 18, 2000 to July 26, 2000, the Debtor transferred the proceeds of the Solomon Smith Barney account and the proceeds of the Prudential policy to Attorney Harman's trust account with the intent to hinder, delay or defraud the Plaintiff. The Defendant does not contest that these transfers occurred. Further, the Defendant does not contest that these transfers occurred after the Plaintiff had obtained a trustee process on other accounts held by the Debtor. However, the accounts transferred were not subject to the trustee process.

Count III must fail for two reasons. First, by letter dated July 21, 2000, which included the draft bankruptcy schedules, these transfers, some of which had not yet occurred, were identified. Second, though transferred to Attorney Harman's trust account, the Debtor maintained control of these funds. Although bankruptcy had not yet been filed, the Plaintiff, with knowledge of these transfers, took no action to place a lien on the funds. The mere fact that these transfers were immediately disclosed to the Plaintiff negates any evidence of intent to hinder, delay or defraud the Plaintiff. Count III is denied.

D. COUNT IV

Count IV alleges that the Debtor failed to disclose commissions and listing agreements on his bankruptcy petition in an attempt to conceal property of the estate from the Chapter 7 trustee under 727(a)(2)(B). The Court disagrees. First, the Defendant testified that he did not know what an executory contract was. The Court finds this credible to a lay person. Second and more important, the Defendant testified that he did not believe that the commissions were his until the real estate transaction actually closed. The legal issue as to when a real estate broker earns his or her commission is a subject of debate. See, e.g., Parsons v. Union Planters Bank (In re Parsons), 262 B.R. 475, 479 (B.A.P. 8th Cir. 2001); Tully v. Taxel (In re Tully), 202 B.R. 481 (B.A.P. 9th Cir. 1996). The Court cannot find that the failure to list the commissions constitutes the intent required under 727(a)(2)(B). Count IV is denied.

E. COUNT V

The Plaintiff alleges that the Debtor failed to disclose certain information on his bankruptcy schedules and also gave false testimony at a section 341 meeting. Section 727(a)(4)(A) requires that the debtor knowingly and fraudulently made a false oath or account as to a material fact in connection with the case. See, e.g., Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 764 (1st Cir.1994); Boroff v. Tully (In re Tully), 818 F.3d 106, 110 (1st Cir. 1987); Smith v. Grondin (In re Grondin), 232 B.R. 274, 276 (B.A.P. 1st Cir. 1999). The Plaintiff must prove not only that an omission was made, but that it was omitted both knowingly and fraudulently. Adopting the reasoning set forth with respect to Count IV, the Court finds that the failure to list the commissions did not constitute a knowing and fraudulent making of a false oath and, therefore, Count V is denied.

F. COUNT VI

Count VI alleges that the listing on the bankruptcy schedules that the transfer of the Debtor's shares of Real Estate Settlement Services, Inc. took place on September 27, 2000 constitute a false oath since the shares were actually transferred effective January 1, 2001. The Court disagrees. September 27, 2000 is the date that the Defendant's divorce was granted. Paragraph 15 of the stipulation awarded

the shares of Real Estate Settlement Services, Inc. and Diafil, Inc. to Kim Diamond, his wife. The Defendant testified that he believed that, as of September 27, 2000, the shares belonged to Kim and that the actual transfer was just a ministerial act. Once again, the Court finds this to be a logical position to be taken by a lay person. It supports the conclusion that the discrepancy in the bankruptcy schedules was not a knowingly and fraudulently made false oath. Count VI is denied.

CONCLUSION

For the reasons outlined above, the Court denies Counts I through VI of Premier Capital's complaint. This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate final judgment consistent with this opinion.

DATED this 27th day of March, 2003, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge