

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 98-10392-JMD
Chapter 7

Alfred J. Armstrong, Jr.
and Maureen J. Armstrong,
Debtors

Daniel Fischbein,
Plaintiff

v.

Adv. No. 98-1062-JMD

Alfred J. Armstrong, Jr.,
Defendant

Erland C. L. McLetchie, Esq.
SCHROEDER, MCLETCHE & CLOUGH
Attorney for Plaintiff

Donald M. Ekberg, Esq.
EKBERG & ASSOCIATES
Attorney for Debtors/Defendant

MEMORANDUM OPINION

I. INTRODUCTION

Daniel Fischbein brought a complaint seeking to deny the discharge of Alfred J. Armstrong, Jr. (the “Debtor”) pursuant to 11 U.S.C. §§ 727(a)(2) and (a)(4)(A) for the Debtor’s failure to disclose certain assets on his bankruptcy petition. The Court conducted a consolidated trial of this case with another adversary proceeding brought by Mr. Fischbein pursuant to 11 U.S.C. § 523(a)(2)(A), in which Mr. Fischbein objected to the dischargeability of an alleged obligation of the Debtor to him relating to plumbing and heating work that the Debtor agreed to perform for Mr. Fischbein at the Ridgewood Country Club in Moultonboro, New Hampshire (the “Ridgewood job”).

In the instant adversary proceeding, Mr. Fischbein alleges that the Debtor failed to list on his bankruptcy petition significant assets, including a motorcycle, a computer, heating equipment, and a cellular phone security deposit. In addition, Mr. Fischbein alleges that the Debtor made substantial cash withdrawals in the month prior to bankruptcy that has resulted in his concealing pre-petition payments to creditors and newly acquired assets. Mr. Fischbein further alleges that the Debtor failed to list on his bankruptcy petition pre-petition preferential payments that he made to his creditors, specifically a payment to F.W. Webb & Company, Inc. (“F.W. Webb”) for materials for the Ridgewood job. Accordingly, Mr. Fischbein requests that the Debtor’s discharge be denied pursuant to 11 U.S.C. §§ 727(a)(2) and (a)(4)(A).

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).

II. DISCUSSION

Section 727(a) of the Bankruptcy Code provides in relevant part:

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, 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).

“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.’” Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997) (quoting Boroff v. Tully (In re Tully), 818 F.2d 106, 110 (1st Cir. 1987)). A debtor is entitled to a starting presumption that most debtors

are honest and do not ordinarily engage in fraudulent activities. See In re Riso, 74 B.R. 750, 756 (Bankr. D.N.H. 1987). The purpose of certain sections of the Bankruptcy Code, such as sections 727(a)(2) and (a)(4)(A), is to make certain, however, 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. See Palmacci, 121 F.3d at 786 (citing Tully, 818 F.2d at 110).

To deny a debtor's discharge pursuant to section 727(a)(2), based on a fraudulent transfer or concealment of assets, a creditor must prove four elements: (1) the debtor transferred, removed, concealed, destroyed, or mutilated, (2) his property, (3) within one year of bankruptcy filing, (4) with intent to hinder, delay, or defraud creditors. See In re Hayes, 229 B.R. 253, 259 (B.A.P. 1st Cir. 1999). Any determination concerning fraudulent intent depends largely upon an assessment of the credibility and demeanor of the debtor. See Commerce Bank & Trust Co. v. Burgess (In re Burgess), 955 F.2d 134, 137 (1st Cir. 1992).

In order to deny a debtor's discharge under section 727(a)(4)(A), the plaintiff must show that (1) the debtor knowingly and fraudulently made a false oath, (2) relating 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); Tully, 818 F.2d at 110. A debtor's discharge should not be denied under section 727(a)(4)(A) if the false statement or omission is due to mistake or inadvertence or if the mistake is technical and not real. See Gordon v. Mukerjee (In re Mukerjee), 98 B.R. 627, 629 (Bankr. D.N.H. 1989). "A trivial matter which has but little effect upon the estate and the creditors is treated as immaterial." In re Irving, 27 B.R. 943, 945 (Bankr. E.D.N.Y. 1983) (quoted in Mukerjee, 98 B.R. at 629).

When seeking denial of a debtor's discharge under section 727, the plaintiff has the burden of proof and must establish the elements by a preponderance of the evidence. See Hayes, 229 B.R. at 259 (citing Gillickson v. Brown (In re Brown), 108 F.3d 1290, 1293 (10th Cir. 1997); Lansdowne v. Cox (In re Cox), 41 F.3d 1294, 1297 (9th Cir. 1994); Barclays/American Business Credit, Inc. v. Adams (In re Adams), 31 F.3d 389, 393-94 & n. 1 (6th Cir. 1994); Montey Corp. v. Maletta (In re Maletta), 159 B.R. 108 (Bankr. D. Conn. 1993); Grogan v. Garner, 498 U.S. 279, 289-91 (1991) (concluding that the appropriate standard of proof for section 523(a) actions is by a preponderance and suggesting that it is the same under section 727));

In re Riso, 74 B.R. 750, 756 (Bankr. D.N.H. 1987); Fed. R. Bankr. P. 4005. For the reasons outlined below, Mr. Fischbein has failed to satisfy his burden under either sections 727(a)(2) or 727(a)(4)(A) of the Bankruptcy Code.

A. Motorcycle

With respect to Mr. Fischbein's claim that the Debtor failed to list a motorcycle on his bankruptcy schedules and that he concealed its existence from creditors, the Court finds that Mr. Fischbein presented insufficient evidence at trial to establish that the Debtor owned a motorcycle at the time the bankruptcy petition was filed. Mr. Fischbein's testimony on the issue was limited to his statement that he believed that the Debtor owned a white motorcycle at the time he filed for bankruptcy on February 10, 1998. Mr. Fischbein's son testified that he saw the Debtor riding a black and chrome motorcycle in the spring and summer of 1997. The Debtor testified that his friend owned a motorcycle and stored it at the Debtor's home. The Debtor further testified that he used his friend's motorcycle often, both pre- and post-petition. The Debtor also testified that after he filed for bankruptcy protection in February 1998 he purchased his own motorcycle.

Given the Debtor's explanation regarding the motorcycle and the lack of direct evidence establishing that the Debtor held a property interest in a motorcycle at the time the petition was filed (e.g., a certificate of title showing that the Debtor owned a motorcycle when he filed for bankruptcy), the Court finds that the Debtor did not make a false statement regarding ownership of a motorcycle on his bankruptcy schedules within the meaning of section 727(a)(4)(A) nor did he conceal property which would warrant denial of his discharge under section 727(a)(2).

B. Computer

Mr. Fischbein has also alleged that the Debtor failed to list a computer on his bankruptcy schedules. The Debtor has admitted that he neglected to list his family computer on Schedule B of his petition. He testified that the computer is used by his four children and that it has been used occasionally by his wife. According to the Debtor, at the time he filled out his bankruptcy schedules it did not occur to him that the computer should specifically be listed on Schedule B.

While the Court does not condone the Debtor's omission of the computer from his schedules, the Court finds that this omission does not warrant denial of the Debtor's discharge under section 727(a)(2) because the evidence failed to show that the Debtor intended to conceal the computer from his creditors. The omission does not warrant denial of the Debtor's discharge under section 727(a)(4)(A) because the evidence failed to establish that the Debtor "knowingly and fraudulently" made the false oath or account. See Harman v. Brown (In re Harman), 56 B.R. 63, 68 (Bankr. D.N.H. 1985) (holding that omission of three of four air compressors from the debtors' schedules did not support denial of their discharge under section 727(a)(4)(A) because there was no evidence that the debtors had any intent to deceive).

In addition, the Court finds that the Debtor's failure to list the computer had little effect upon the Debtor's estate. See Mukerjee, 98 B.R. at 629. Here, the Debtor testified that he paid \$1,800 for the computer over a year ago. The Court takes judicial notice that the value of both new and used computers has decreased substantially in the past several years. The Court takes further judicial notice that the Debtor could have exempted the computer pursuant to RSA 511:2(XVII), New Hampshire's wildcard exemption, as the Debtor and his wife used only \$700 of the \$8,000 exemption according to Schedule C. Thus, even if the Debtor had disclosed the computer on his schedules, no benefit would have flowed to his creditors as a result. For this additional reason, the Court finds that Mr. Fischbein has failed to satisfy his burden under section 727(a)(4)(A) with respect to the computer.

C. Heating Equipment

Mr. Fischbein also alleges that the Debtor failed to list heating equipment, including the boiler to be used at the Ridgewood job, in the Debtor's Statement of Financial Affairs and Schedule B. At trial the Debtor acknowledged that at the time he filed his bankruptcy petition he possessed some equipment for use in his plumbing and heating business, including the boiler that was to be used on the Ridgewood job. The Debtor testified that he listed his business inventory on his petition as "parts." The Court takes judicial notice that in response to Question 18 of the Statement of Financial Affairs the Debtor listed \$5,000 in "parts & tools" and in Part 27 of Schedule B the Debtor listed "parts, service equipment & tools" worth \$5,000. The Court notes further that in response to Part 28 of Schedule B, which requires debtors to list "inventory," the Debtor responded "NONE."

Although the Debtor may have failed to list the equipment in all of the appropriate places on the Statement of Financial Affairs and/or Schedule B, the Court finds that the Debtor did not intend to conceal the existence of this equipment or defraud the Court and his creditors by omitting it from his schedules. For this reason the Court finds that Mr. Fischbein has failed to meet his burden under either sections 727(a)(2) or 727(a)(4)(A).

D. Cellular Phone Security Deposit

Although not raised in Mr. Fischbein's complaint, in his pre-trial papers and again at trial, Mr. Fischbein alleged that the Debtor failed to list on his petition a \$400 security deposit held by his cellular telephone service provider and that this failure should result in the denial of his discharge pursuant to either sections 727(a)(2) or 727(a)(4)(A). For the same reasons discussed above in relation to the Debtor's computer, the Court finds that Mr. Fischbein has failed to meet his burden under either sections 727(a)(2) or 727(a)(4)(A) to prove that the Debtor acted "knowingly and fraudulently" or that the omission was "material" where the Debtor could have exempted the security deposit under the wildcard exemption.

E. Cash Withdrawals

Mr. Fischbein further alleges that the Debtor cashed checks made out to himself or to cash in the months preceding his bankruptcy filing and that he used the cash either to pay his creditors or to purchase goods, including motorcycle parts, for himself and others. According to Mr. Fischbein, the Debtor failed to list these pre-petition payments to creditors or to list the purchased goods as assets on his bankruptcy schedules, all in an attempt to defraud his creditors and the Court. In his post-trial memorandum, Mr. Fischbein states that in the thirty-eight days prior to bankruptcy, specifically from January 3, 1998 to February 10, 1998, the Debtor and his co-debtor spouse cashed checks made out to the Debtor, to the Debtor's spouse, or to cash in the total amount of \$3,500.¹

The Debtor testified that he often made checks payable to himself or to cash as a way of doing business and paying household bills. The Court notes that during a forty-four day period from October 29, 1997 to December 11, 1997, the Debtor and his co-debtor spouse cashed a similar number of checks in the total amount of \$2,300.² The Court accepts as credible the Debtor's statement at trial that he prefers to carry large amounts of cash and use this money to pay for both business and household purchases and bills in the ordinary course of his financial affairs.

¹ See Exhibit 6 containing copies of check #628 dated 1/3/98 made payable to Al Armstrong, Jr. in the amount of \$300; check #634 dated 1/6/98 made payable to Al Armstrong, Jr. in the amount of \$500; check #644 dated 1/13/98 made payable to Al Armstrong, Jr. in the amount of \$1,400; check #__ dated January 14, 1998 made payable to Maureen Armstrong in the amount of \$150; check #653 dated 1/26/98 made payable to cash in the amount of \$500; check #654 dated 1/26/98 made payable to cash in the amount of \$350; and check #663 dated 1/27/98 made payable to cash in the amount of \$300.

² See Exhibit 6 containing copies of check #517 dated 10/29/97 made payable to Al Armstrong, Jr. in the amount of \$300; check #527 dated 11/10/97 made payable to Al Armstrong, Jr. in the amount of \$100; check #549 dated 11/22/97 made payable to Al Armstrong, Jr. in the amount of \$100; check #551 dated 11/24/97 made payable to Al Armstrong, Jr. in the amount of \$100; check #569 dated 12/3/97 made payable to Maureen Armstrong in the amount of \$400; check #571 dated 12/3/97 made payable to Al Armstrong, Jr. in the amount of \$100; check #577 dated 12/5/97 made payable to Al Armstrong, Jr. in the amount of \$100; check #578 dated 12/5/97 made payable to Maureen Armstrong in the amount of \$500; check #582 dated 12/6/97 made payable to Al Armstrong, Jr. in the amount of \$100; check #587 dated 12/8/97 made payable to cash in the amount of \$400; and check #593 dated 12/11/97 made payable to Maureen Armstrong in the amount of \$100.

Except to the extent that the Debtor testified that he purchased motorcycle equipment for friends in January 1998 in the amount of \$1,400 because he was traveling some distance to the town where the motorcycle parts dealer was located, Mr. Fischbein presented no evidence regarding what other goods the Debtor allegedly purchased or which creditors the Debtor allegedly paid with the funds or in what amounts. Accordingly, the Court finds that Mr. Fischbein has failed to prove that the Debtor and his co-debtor spouse cashed checks for a significant amount of money to pay off creditors or to purchase assets, which were not listed on the schedules or statement of financial affairs, with an intent to defraud creditors and the Court. For this reason the Court finds that Mr. Fischbein has failed to meet his burden under either sections 727(a)(2) or 727(a)(4)(A).

F. Pre-Petition Payment to F.W. Webb

Mr. Fischbein has raised an issue as to the Debtor's failure to list on his petition the pre-petition payment he made to F.W. Webb on account of the boiler he purchased for the Ridgewood job. In his post-trial memorandum, Mr. Fischbein states that "[a]fter receiving approximately \$6,800 of items on credit from F. W. Webb & Co., Inc., [the Debtor] thereafter on December 18, 199[7], paid them that amount of money. Clearly, that would have to be considered a preference. It appears clear that Mr. Armstrong did not wish to list his preferential transactions with F.W. Webb & Co., Inc. as, when he filed, he had a credit with them of \$700 that he apparently desires to retain."

The checks submitted into evidence show that on December 6, 1997 the Debtor drafted a check in the amount of \$6,450.25 made payable to F.W. Webb with a notation on the check that it was for "Ridgewoods C.C." Contrary to Mr. Fischbein's allegations, it appears that the Debtor paid for the boiler upon its purchase as the parties apparently agree that the Debtor delivered the boiler to the Ridgewood job site on December 8, 1997. When a dispute between the parties erupted, the Debtor picked up the boiler and other materials delivered to the site and returned them to F.W. Webb for credit. The Debtor listed the remainder of this F.W. Webb credit in Part 15 of Schedule B as a \$700 "credit to business account."

Accordingly, the Court finds that Mr. Fischbein has failed to demonstrate that the Debtor tried to conceal his transactions with F.W. Webb from his creditors or that he made a false statement on his

bankruptcy petition. For those reasons, Mr. Fischbein's claims under sections 727(a)(2) and 727(a)(4)(A) with respect to the F.W. Webb transaction must fail.

III. CONCLUSION

As Mr. Fischbein did not satisfy his burden under sections 727(a)(2) and 727(a)(4)(A) of the Bankruptcy Code, his complaint is denied. The Debtor is entitled to his Chapter 7 discharge. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

DATED this 23rd day of September, 1999, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge