2001 BNH 020 **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. 99-12517-JMD
Chapter 7

Charles Kalantzis,
Debtor

J. Christopher Marshall, U.S. Trustee,
Katherine Porter, and
Kristen Bowman,
Plaintiffs

v. Adv. No. 99-1173-JMD

Charles Kalantzis,
Defendant

William B. Pribis, Esq.
CLEVELAND, WATERS AND BASS, P.A.
Attorney for Plaintiffs Kristen Bowman and Katherine Porter

Geraldine B. Karonis, Esq.
Assistant United States Trustee

Mark W. McDonald, Esq.
FORD & WEAVER, P.A.
Attorney for Debtor/Defendant

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On March 2, 2001, Charles Kalantzis (the "Debtor") filed a Motion for Reconsideration, asking the Court to reconsider its February 27, 2001 Memorandum Opinion. See Marshall v. Kalantzis (In re Kalantzis), 2001 BNH 009. On March 29, 2001, the Court held a hearing on the Motion for Reconsideration. After hearing from all parties, the Court took the matter under advisement. For the reasons discussed below, the Debtor's Motion for Reconsideration is denied.

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. BACKGROUND

As resolution of this adversary proceeding has been drawn out over an extended period of time, a brief review of the history of the events in this case is necessary. On June 8, 2000, the Court commenced the trial in this adversary proceeding brought by Absolute Financial Services, LP (the "Original Plaintiff") seeking to deny the Debtor a discharge pursuant to 11 U.S.C. §§ 727(a)(2), (a)(3), (a)(4)(A), and (a)(5). After the close of the Original Plaintiff's case, the trial was recessed for lunch. When the trial resumed after lunch, the parties informed the Court that they had reached a settlement agreement during the lunch recess. Accordingly, the Court suspended the trial to permit the parties to reduce their agreement to writing and seek approval of the settlement. The United States Trustee and creditors Kristen Bowman and Katherine Porter objected to the settlement. On August 21, 2000, after notice and a hearing, the Court found that the settlement was not fair and equitable or in the best interests of the estate and denied approval. See Absolute Financial Services, LP v. Kalantzis (In re Kalantzis), 2000 BNH 030. On August 30, 2000, the Debtor filed a motion to approve an amended settlement agreement between the Original Plaintiff and the Debtor. See Doc. No. 27. The same parties objected to approval of the amended settlement and moved to be substituted as plaintiffs in the adversary proceeding.

At the hearing on the amended settlement agreement, the Debtor withdrew the settlement offer, the Original Plaintiff indicated that it no longer wished to pursue its complaint, and the Court granted the motion of the United States Trustee, Kristen Bowman, and Katherine Porter (the "Substituted Plaintiffs") to be

substituted as plaintiffs in place of the Original Plaintiff.[1] See Doc. No. 42. The trial resumed on January 16, 2001, and the Court heard closing arguments. On February 27, 2001, the Court issued a Memorandum Opinion in which it denied the Debtor's discharge under section 727(a)(4). See Marshall v. Kalantzis (In re Kalantzis), 2001 BNH 009.

III. FACTS

As the Debtor's Motion for Reconsideration relates only to the section 727(a)(4) claim, the facts discussed will be limited to those relating to the Court's decision on the Plaintiffs' section 727(a)(4) claim. The Court's decision on the section 727(a)(4) claim is based upon the false oaths and omissions contained in the Debtor's schedules and statement of affairs. The omissions and false oaths that are of concern surround the Debtor's transfer of his business to a third party prior to the filing of the Debtor's bankruptcy petition.

During the trial there was testimony from both the Debtor and a witness, Pamela Fielder ("Fielder"), regarding the transfer of the business, when the transfer occurred, whether the transfer was legitimate, and the disposition of the proceeds associated with the transfer. Both the Debtor and Fielder testified about the date of the transfer, the circumstances surrounding the transfer, and how the business was run after the transfer had taken place. Both the Debtor and Fielder also gave testimony with regards to documents evidencing the transfer that were entered into evidence as Exhibits 3 and 102.

After a break in the trial for the failed attempts at settlement, the trial was resumed on January 16, 2001. Prior to the resumption of trial, the Court responded from the bench to a Request for Clarification filed by the Debtor requesting clarification of the Court's denial of the Debtor's motion for a directed verdict. See Doc. No. 49. The Court went through each of the claims brought by the Plaintiffs and specifically stated what evidence had been presented by both sides on each element of each claim. With

[1] Any reference to "Plaintiffs" in this opinion refers collectively to the evidence presented and statements made by the Original Plaintiff and/or the Substituted Plaintiffs.

regards to the first element of an objection to discharge under section 727(a)(4), the Court stated that it was apparent that there were false oaths and omissions in the schedules and statements of financial affairs. The Court gave several examples of the false oaths and omissions contained in the Debtor's schedules and statement of affairs such as the failure to disclose that the Debtor had run a proprietorship within two years of filing and the failure to correctly list the ownership of the stock. The Court went on to say that it was not clear whether the evidence showed that the remaining two elements under section 727(a)(4) had been established namely, (1) whether the false oaths were made knowingly and fraudulently and (2) whether or not the omitted and erroneous facts were material.

After finishing with its remarks concerning the Request for Clarification, the Court offered to continue the trial if the parties wanted time to consider the Court's remarks. All parties declined the Court's offer and stated that they wanted to proceed with the remainder of the trial that day.

The Debtor did not object to the statements made by the Court with regards to the Request for Clarification and declined to put on any evidence in defense of the Plaintiffs' complaint. The Debtor did, however, responded to the Court's statements in his closing argument. Specifically, the Debtor stated that he could play the tape from the section 341 meeting to show that the Debtor had not been hiding the transfer, as the matter had been disclosed at the section 341 meeting. The Court responded by telling the Debtor that he was free to open the evidentiary record and play the tape as part of his defense if he wished, but the Debtor decided against doing so.

IV. DISCUSSION

A "motion for reconsideration" is not a motion that is recognized by the Federal Rules of Civil Procedure ("Rule"). In re Rodriguez, 233 B.R. 212, 218-19 (Bankr. D.P.R. 1999) (citations omitted). "The federal courts have consistently stated that a motion so denominated which challenges the prior judgment on the merits will be treated as either a motion 'to alter or amend' under Rule 59(e) or a motion for 'relief from judgment' under Rule 60(b)." Id. "Which rule applies depends essentially on the time a

motion is served. If a motion is served within ten days of the rendition of judgment, the motion ordinarily will fall under Rule 59(e). If the motion is served after that time, it falls under Rule 60(b)." Id.

In this particular case, the "motion for reconsideration" was filed within ten days of the Court's ruling. See Doc. No. 57. Accordingly, the Court will treat the motion as one filed under Rule 59(e), as it has been made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 9023. In order to be successful on a Rule 59(e) motion a moving party must establish a manifest error of law or fact or must present newly discovered evidence. Landrau-Romero v. Banco Popular de Puerto Rico, 212 F.3d 607, 612 (1st Cir. 2000).

In his Motion for Reconsideration and at the March 29, 2001 hearing on the Motion for Reconsideration, the Debtor contends that the Court should reconsider its prior order denying the Debtor's discharge under section 727(a)(4) for two reasons. First, the Debtor claims that the Court made an error of law by basing its decision on a claim that was not raised in the pleadings. Second, the Debtor claims that the Court made a factual error when the Court based its decision on the fact that the transfer between Fielder and the Debtor had been hidden from the Chapter 7 Trustee.

A. Error of Law

Bankruptcy Rule 7015(b) allows for pleadings to be amended when "issues not raised by the pleadings are tried by express or implied consent of the parties." Motions to amend complaints under Bankruptcy Rule 7015(b) should be liberally allowed. Noonan v. Kuei Fong Rauh (In re Rauh), 119 F.3d 46, 52 (1st Cir. 1997). A motion to conform to the evidence should be granted unless the opposing party would be prejudiced by allowing such an amendment. Id. Unfair prejudice refers to whether or not a party had a fair opportunity to defend against the allegation and whether or not additional evidence could be offered by the party if the case were to be retried on a different theory. Id.

While it may not have been entirely clear from the complaint or the amended complaint filed by the Original Plaintiff that the failure to disclose the transfer was an issue with regards to section 727(a)(4), the Court finds that several factors point to the Debtor's awareness that the matter was before the Court. First,

the Debtor was sufficiently aware of the issue to mention in his response to the amended complaint that the Debtor had disclosed the transfer at the section 341 meeting. See Doc. No. 7 ¶ 8. Second, there was testimony at trial from both the Debtor and Fielder regarding the transfer. Third, the Court made it clear when clarifying the motion for a directed verdict that the failure to disclose the transfer was an issue with regards to the Plaintiffs' accusations under section 727(a)(4).

The Court notes that its clarification of the directed verdict motion came after the close of the Plaintiffs's case, but *prior* to the presentation of the Debtor's case. While the Debtor now claims that he would have presented evidence regarding the failure to disclose the transfer if he had known it was an issue, the Court finds that after the Court's oral ruling on his Request for Clarification the Debtor was clearly on notice that it was an issue and had an opportunity to present evidence on the matter and declined to do so. Notwithstanding the fact that the Debtor was on notice that the failure to disclose the transfer was an issue before the Court when he chose to waive his right to put on a case, the Debtor was given a second opportunity to present evidence during closing arguments. During closing arguments, the Debtor stated to the Court that he could play the section 341meeting tape to show that the Debtor did not hide the transfer from the Trustee or creditors, and yet, when the Court gave the Debtor the opportunity to do so, the Debtor declined to play the tape and enter it into evidence. The Debtor had notice that the failure to disclose the stock transfer to Fielder in his schedules was an issue before the Court and failed to present evidence on the matter even when given a second opportunity during closing arguments.

For the aforementioned reasons, the Court finds that the pleadings were amended by the implied consent of the parties. The Debtor was made aware that the failure to disclose the transfer of the business was an issue before the Court during the Court's discussion of the Debtor's Request for Clarification. The Debtor did not object to the Court's comments concerning the false oaths contained in the Debtor's schedules and even addressed the issue in his closing argument. Further, the Debtor was given an opportunity to present his case and declined to do so by waiving his right. Finally, the Debtor was even given a second opportunity to put the section 341 meeting tape into the record during closing arguments.

Therefore, the Debtor was given a fair opportunity to present evidence with regards to the false oath claim under section 727(a)(4).

B. Error of Fact

The Debtor has also claimed in his Motion for Reconsideration that Court made an error of fact by basing its decision on the fact that the transfer was hidden from the Chapter 7 Trustee. The Debtor claims that information indicating that the transfer was disclosed can be found in several places. The Debtor first points to his answer and amended answer. The Debtor claims that in responding to the complaint and the amended complaint the Debtor indicated in his response that the transfer had been revealed at the section 341 meeting, but that the disposition of the proceeds of the transfer had not been fully disclosed. See, e.g., Doc. No. 7 ¶ 8. The Debtor also points to the Trustee's motion to extend the deadline for objecting to discharge, as evidence that the transfer was disclosed to the Trustee. See In re Kalantzis, Bk. No. 99-12517-JMD, Doc. No. 11. The Debtor claims that in his motion to extend the discharge deadline the Trustee stated that the reason needed for the extension was the need to follow up on the stock transfer that was discussed at the section 341 meeting.

The Debtor claims that although the above documents were never entered into evidence, the Court should take judicial notice of the pleadings filed in the Debtor's case. Even if the Court were to take judicial notice of the pleadings, the Court can only take judicial notice of facts that are not subject to reasonable dispute because they are generally known within the territorial jurisdiction of the Court or are capable of accurate determination from sources whose accuracy cannot be reasonably questioned. See Fed. R. Bankr. P. 9017; Fed. R. Evid. 201; Calder v. Job (In re Calder), 907 F.2d 953, 955 n.2 (10th Cir. 1990). "While a bankruptcy judge may take judicial notice of a bankruptcy court's records, *see* Fed. R. Evid. 201(c) . . . [h]e may not infer the truth of the facts contained in documents, unfettered by rules of evidence or logic, simply because such documents were filed with the court." See Staten Island Sav. Bank v. Scarpinito (In re Scarpinito), 196 B.R. 257, 267 (Bankr. E.D.N.Y. 1996). The rules of evidence require that testimony be

given under oath. See Fed. R. Bankr. P. 9017; Fed. R. Evid. 603. Further, witnesses must have personal knowledge of the matters upon which they testify. See Fed. R. Bankr. P. 9017; Fed. R. Evid. 602.

Attorneys are not under oath when they submit pleadings and may base their allegations or arguments upon information that is outside of their personal knowledge. Accordingly, the most the Court can do is take notice that the pleadings are contained within the Court's docket. The Court may not take judicial notice of the truth of unsworn statements made within the pleadings.

The second problem with the Debtor's argument is that while the pleadings that have been filed may indicate that the transfer was disclosed to the Trustee, the pleadings do not indicate what the Trustee was told. The Court can not discern from the pleadings how much information was revealed to the Trustee, nor whether such information was correct. Nor can the Court discern whether the information was volunteered by the Debtor or was only revealed after prying questions by the Trustee or creditors.

The Debtor next points to his testimony at trial as evidence that the transfer was disclosed. Specifically, the Debtor points to pages 63 and 64 of the trial transcript as evidence that the transfer was disclosed to the Trustee. The testimony referred to by the Debtor involves the questioning of the Debtor by Attorney Rinden, attorney for the Original Plaintiff, as follows:[2]

> Q. Now at the first meeting of creditors, you indicated that you sold Tan Lines to Pamela Fielder in December of 1999 for $35,000, did you not?
> A. I sold shares, my shares that I own.
> MR. McDONALD: I guess I object, Your Honor. That's a mischaracterization. I have a transcript of the 341 hearing.
> THE COURT: Well, you know, he's asking the witness if he said something. The witness responds. And you can cross-examine your own witness and straighten it up.
> McDONALD: Sure.
> BY THE WITNESS: A. Can you ask me the question again, please?
> . . .
> BY MR. RINDEN: Q. Now you indicated at the first meeting of creditors that you sold the Tan Lines business to Pamela Fielder in December of 1998?
> A. I was consistent on my testimony–
> Q. Just answer Yes or No, and then you may explain.
> A. No.

[2] The following excerpt of the testimony is from the June 8, 2000 trial. The testimony begins on page 63 line 20 and ends on page 64 line 22.

Q. All right. And you deny having said that you sold the business to her?
A. In my testimony I said that I sold shares of the stock.

Although the Debtor was asked about whether he revealed the information at the section 341 meeting, he never really answered the question. Even assuming for the sake of argument that the Debtor's answer was enough evidence to show that the transfer was revealed at the section 341 meeting, his answer does not reveal exactly what the Trustee was told. As with the pleadings that were discussed previously, the Court does not know the extent of the information revealed to the Trustee nor the manner in which the information was revealed. Accordingly, the Court finds that based upon the record before it, no error of fact was made in rendering its decision on the section 727(a)(4) claim.

V. ORDER

For the reasons stated in the Memorandum Opinion, the Court finds that the Debtor has not established that the Court made an error of fact or law in rendering its decision. Accordingly, the Debtor's Motion for Reconsideration is **denied.**

This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DATED this 26th day of April, 2001, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge