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

In re:

Bk. No. 96-12653-MWV
Chapter 7

Reginald L. Gaudette,
Debtor

JAAJ Realty Corporation,
Plaintiff

v.

Adv. No. 97-1027-MWV

Reginald L. Gaudette,
Defendant

David W. Carr, Esq.
Attorney for Plaintiff

Reginald L. Gaudette, Pro se

William S. Gannon, Esq.
Attorney for the Trustee, Richard Erricola

MEMORANDUM OPINION

The Court has before it the complaint of JAAJ Realty Corporation (“Plaintiff”) against Reginald L. Gaudette (“Debtor”/“Defendant”) seeking the denial of the Debtor’s discharge pursuant to section 727(a)(2)(A) & (B), (3), (4)(A) & (B), and (5).

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).

DISCUSSION

The Debtor filed the above captioned Chapter 7 case on September 23, 1996. This complaint was brought on April 14, 1997 and tried on March 23 and 24, 1998, at which time the Court took the matter under advisement. The Court has not previously rendered its decision for a variety of reasons, including the possibility of settlement of this and various other related pieces of litigation before the Court. However, during the interim, both Debtor and Plaintiff have been before the Court on related matters on numerous occasions, and this Court has either ruled on or taken these other matters under advisement. Because of the continuous stream of litigation, the Court has not forgotten the demeanor of any of the witnesses. In preparation for rendering this decision, the Court has once again listened to the tapes of the entire trial, reviewed the pleadings and the voluminous exhibits admitted at trial, and considered the parties' requests for findings of fact and rulings of law.

To attempt to set out the facts would be meaningless. The complaint is fourteen pages long, consisting of 103 numbered paragraphs, not including sub-parts. The litigation originally arose between the parties concerning the real estate in Derry, New Hampshire, in which the Plaintiff, or a related entity, was a tenant. Prior to the bankruptcy, litigation was commenced by the Plaintiff against the Defendant and others in various courts. Suffice it to say that the litigation has been contentious, resulting in this bankruptcy case and adversary proceeding. This opinion will address the allegations set forth in the complaint, count by count.

“[I]n order to achieve the Bankruptcy Code's goal of providing debtors with a ‘fresh start’ through discharge, each section of § 727 is to be construed liberally in favor of the debtor and strictly against objecting creditors.” CIT Group/Sales Fin., Inc. v. Lord (In re Lord), 244 B.R. 196, 199 (Bankr. D.N.H. 1999); see also 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)) (“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.’’). 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. Protection Corp. v. Hayes (In re Hayes), 229 B.R. 253, 259, n. 7 (B.A.P. 1st Cir. 1999); In re Lord, 244 B.R. at 199.

Count I

Count I alleges that the Debtor should be denied a discharge under section 727(a)(2)(A) of the Bankruptcy Code. Section 727(a)(2)(A) states:

- (a) 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, 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[.]

11 U.S.C. § 727(a)(2)(A). The count alleges transfers or concealment concerning numerous assets of the Debtor. However, the Plaintiff, in his request for findings, concentrated on one asset, namely, 353 Maple Street, Manchester, New Hampshire. This opinion addresses each of the assets included in Count I, sub-parts A through E, below.

A. 353 Maple Street, Manchester, New Hampshire

The essence of the complaint is that the Debtor transferred and concealed the rents from 353 Maple Street with intent to hinder, delay or defraud a creditor. The Debtor's schedules reflect his ownership of the property. The Debtor's testimony is that there was originally a written lease, which expired. At some point, the property, which served as a convenience store and a gas station, was found to have environmental problems and could no longer be used for the purpose of a gas station. Since the property could no longer be used as a gas station, the amount of rent the tenant was paying was reduced.

Debtor's further testimony is that, in an effort to shield himself from liability, rightly or wrongly, he transferred the collection of rents to LLG Services in 1992. In about 1994, the management, including the collection of rents, was taken over by OFS Lending. Both entities kept the rents as their management fee. The tax returns of LLG Services for 1992 and 1993 show income from the property, and the tax returns of OFS Lending for 1994 through 1996 show income from the property. The Debtor's bankruptcy schedules show that he borrowed money from OFS Lending in the years 1994 through 1996. It thus appears that the original transfer of the right to receive the rents took place in 1992 when LLG Services commenced collecting the rents, which is well outside the one year period provided in § 727(a)(2)(A). The Court cannot find that there was a continued concealment since the rents were reported on the tax returns of both LLG Services and OFS Lending. The fact that the Debtor scheduled his ownership of 353 Maple Street is further evidence of a lack of intent to conceal.

B. Gaudette Associates, Inc.

Part B of Count I alleges transfer of certain payments on the promissory note. Evidence supports a finding that the Debtor transferred his interest in the ownership of Gaudette Associates to Thomas and Roseann Hussey in 1986 and took back a note as part of the purchase price. The evidence further indicates that this note was contributed to LLG Family Limited Partnership II in 1991 and, since then, that entity received the payments due on the note. The Court finds that there is no evidence of transfer or concealment by the Debtor within one year preceding the bankruptcy.

C. RLG Family Limited Partnership

Part C of Count I alleges certain transfers by the Debtor to his wife and to RLG Family Limited Partnership I. The transfer to his wife was his interest in their residence, which took place on February 10, 1987. This property, in turn, was transferred by his wife to RLG Family Limited Partnership I, which partnership was effective as of July 1, 1990. The Plaintiff further alleges certain notes were transferred to the same partnership in consideration of the Debtor's interest in the partnership. The Court finds that there were no transfers within one year preceding the Debtor's bankruptcy.

D. J & L Family Limited Partnership III

Part D of Count I alleges certain transfers to the J & L Family Limited Partnership III by the Debtor's wife. Plaintiff further alleges that the items transferred were transferred to her by the Debtor, but the evidence is insufficient to support that contention. In any case, the transfer in question appeared to be when the partnership was formed, effective April 30, 1991. Once again, the transfers are outside the one year period, and there is no evidence of the Debtor's intent to conceal.

E. Liquidation of Individual Retirement Account

Finally, Part E alleges that the Debtor liquidated his IRA just prior to the bankruptcy filing. This is not disputed, and is disclosed in section 10 of the Debtor's Statement of Financial Affairs. The Debtor testified that the funds were used to take a vacation, which he badly needed, and to pay his attorneys and accountant. The Court finds that the termination of the IRA account is fully disclosed and that there is insufficient evidence that the liquidation of the IRA was with the intent to hinder, delay or defraud a creditor.

For all of the above reasons, Count I is denied.

Count II

Count II alleges a violation of section 727(a)(2)(B) of the Bankruptcy Code. Section 727(a)(2)(B) states:

A. 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, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

...

B. property of the estate, after the date of the filing of the petition[.]

11 U.S.C. § 727(a)(2)(B). The count alleges post-petition transfers, namely, the rents collected from 353 Maple Street. However, there is no evidence that any rents were collected post-petition. The Debtor testified that the tenant did not pay any rent after receiving a foreclosure notice from the Bank of New Hampshire. The Debtor could not recall receiving any rents post-petition, and there was no evidence submitted by the Plaintiff that rents were actually paid post-petition. The foreclosure occurred on November 6, 1996, shortly after the Debtor filed bankruptcy. The Plaintiff further alleges in Count II that the Debtor received a payment post-petition on the Hussey note. See supra Count I (B). That note, having been assigned to the partnership long before the filing, cannot be considered a post-petition transfer by the Debtor. Accordingly, Count II is denied.

Count III

Count III alleges various violations of section 727(a)(3) of the Bankruptcy Code. Section 727(a)(3) states:

- (a) The court shall grant the debtor a discharge, unless—
 - ...
 - (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case[.]

11 U.S.C. § 727(a)(3). The discharge “inures to the benefit of the honest debtor who supplies creditors ‘with enough information to ascertain the debtor’s financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present.’” Campana v. Pilavis (In re Pilavis), 244 B.R. 173, 175 (B.A.P. 1st Cir. 2000) (quoting Bay State Milling Company v. Martin (In re Martin), 141 B.R. 986, 995 (Bankr. N.D.Ill. 1992)). This opinion addresses each of the sub-parts included in Count III below.

A. Debtor’s Individual Income Tax Returns

Once again, the Plaintiff alleges failure to keep records or the concealment of income from 353 Maple Street. At trial, the Debtor testified that rents were kept by LLG and then OFS as a management fee and were reported on their respective tax returns. Further, the Debtor showed loans from OFS for 1995 and 1996 from these rents collected on his bankruptcy schedules. The Plaintiff does not agree with the Debtor's handling of this transaction. Sufficient records, however, were produced to determine these financial transactions.

B. The Resource Clinic, Inc.

Part B of Count III alleges that the Debtor failed to keep records on behalf of The Resource Clinic, Inc. The Debtor testified that he did not keep the records of The Resource Clinic, Inc., but they were kept by one Dottie Plante and Steve Oakes. This entity ceased doing business, and it was the Debtor's testimony that Dottie Plante took the records. There was no evidence to the contrary. As to the specific transactions alleged in paragraphs 55 through 58 of the complaint, there was no evidence produced at trial.

C. OFS Lending, Inc.

Part C alleges that the Debtor failed to maintain adequate records of OFS Lending and attempted to conceal its financial affairs. The Debtor testified that until just prior to his bankruptcy filing, he was president, treasurer, secretary and a director of OFS Lending, Inc., which was disclosed in the answer to question 16 of his Statement of Financial Affairs. At trial, the Debtor introduced into evidence OFS Lending's tax returns for the years 1992 through 1996 (Debtor's Ex. V) and the back-up ledger for the returns for the same years (Debtor's Ex. W). The Court finds that OFS Lending maintained adequate records of its financial affairs and that there was insufficient evidence of the Debtor's attempt to conceal the financial affairs of OFS Lending.

D. Equity Trading Partners and Investors, Inc.

Part D, paragraphs 70 to 75 of the complaint, refers to an entity known as Equity Trading Partners and Investors, Inc. and alleges that the Debtor failed to maintain adequate records and attempted to

conceal its financial affairs. The Debtor testified that he was president and treasurer of the entity. He also testified that it never had a checkbook and that he believed the entity did not have to file a tax return since it never had a profit. The only transaction considered by the Plaintiff was in connection with real estate known as 2 Birch Street, Derry, New Hampshire. The Debtor testified that this property was bought at a foreclosure in 1994 and sold to a third party in 1995. The Plaintiff's evidence showed that a certificate for tax purposes in connection with the sale had a tax identification number of an entity other than Equity Trading Partners and Investors, Inc. The Debtor testified that the other tax identification number was used because the proceeds went to that entity, and he believed that was the right thing to do. In any case, the Court finds that the transaction was not concealed and, therefore, is not covered by section 727(a)(3).

E. RLG Family Limited Partnership I

Part E alleges that the Debtor did not keep sufficient records related to the merger of RLG Family Limited Partnership I with J & L Family Limited Partnership III in violation of 11 U.S.C. § 727(a)(3) and N.H. RSA § 304-B:16-a. The Court agrees with the Debtor that N.H. RSA § 304-B:16-a was not adopted until August 8, 1997, after the merger of these two partnerships took place and after the filing of the Debtor's bankruptcy case. In his consolidated Exhibits G through P produced and admitted at trial, the Debtor provided copies of all the family partnership agreements, amount of ownership, and tax returns. While the partnerships may have been formed in part for estate planning purposes and to protect the Debtor's assets, there is insufficient evidence that the Debtor concealed or failed to keep records from which the Debtor's financial condition and business transactions may be ascertained.

F. LLG Family Limited Partnership II

In Part F, the Plaintiff further alleges that LLG Family Limited Partnership II failed to keep adequate records, contending it falsely retained a note from Dorothea Jung on its books. At trial, the Debtor adequately explained that the transaction in question closed in escrow, and when the escrow was satisfied, the documents were released and properly recorded. Debtor's Exhibit U admitted at trial

contained copies of the relevant documents. Once again, there is insufficient evidence to prove that the Debtor attempted to conceal the transaction that adequate financial records were not kept.

For all of the above reasons, Count III is denied.

Count IV

Count IV alleges that the Debtor should be denied a discharge under section 727(a)(4)(A) of the Bankruptcy Code. Section 727(a)(4)(A) states:

- (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 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., In re Tully, 818 F.2d at 110; Smith v. Grondin (In re Grondin), 232 B.R. 274, 276 (B.A.P. 1st Cir. 1999). In essence, the Plaintiff must prove not only that an omission was made, but that it was omitted both knowingly and fraudulently. The Court agrees with the Defendant that no evidence was admitted at trial concerning false statements made at the section 341 meeting.

Further, the Plaintiff, in his request for findings of fact and rulings of law, relies mainly on two omissions from the Debtor's schedules, namely, the failure to list litigation with NPA in his Statement of Affairs and a failure to list a debt to St. Mary's Bank. With respect to the latter, the Debtor testified that he did not remember the debt, that it was assumed by a third party, and that a credit report he obtained to assist in preparing his schedules did not include it. In fact, there was no evidence that the debt still existed. With respect to NPA litigation, the Debtor admitted that it should have been listed. He further

testified that the reason it was not included was that it had been settled in the year prior to the filing and, for that reason, he did not think it had to be included.

The certification upon which the Plaintiff relies is that found at the end of the Statement of Financial Affairs, “I declare under penalty of Perjury [sic] that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct,” and at the end of the Debtor’s schedules, “I declare under penalty of perjury that I have read the foregoing Summary and Schedules, consisting of 18 sheets, and that they are true and correct to the best of my knowledge, information and belief.” Based on the Debtor’s testimony, the Court cannot find that these declarations under pains of perjury were knowingly and fraudulently made. Count IV is denied.

Count V

Count V alleges a violation of section 727(a)(4)(B) of the Bankruptcy Code. Section 727(a)(4)(B) states:

- (a) The court shall grant the debtor a discharge, unless—
...
(4) the debtor knowingly and fraudulently, in or in connection with the case—
...
(B) presented or used a false claim[.]

11 U.S.C. § 727(a)(4)(B). This count alleges that the Debtor knowingly and fraudulently made a false claim. In support of the allegation, the Plaintiff cites the scheduling of related entities as creditors. The Plaintiff’s request for findings seems to rest heavily on the scheduled amount owed to Boulevard Drive-In, Inc., \$2,500,000. Debtor’s Exhibits A through C shed some light on this debt as it apparently resulted from the settlement of litigation against the Debtor and others in which Boulevard Drive-In, Inc. bought certain notes and was assigned various documents. There is no evidence before the Court that Boulevard Drive-In, Inc. or, indeed, the other entities listed in paragraph 92 of the complaint did not hold claims.

Further, there is insufficient evidence that the claims are anything other than what are scheduled. The Debtor rightly scheduled the claim allowing the trustee and a creditor the right to dispute the amount. The Court finds that the Debtor did not knowingly and fraudulently submit a false claim and, thus, denies Count V.

Count VI

Count VI of the Debtor's complaint alleges a violation of section 727(a)(5) of the Bankruptcy Code. Section 727(a)(5) states:

(a) The court shall grant the debtor a discharge, unless—

...

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities[.]

11 U.S.C. § 727(a)(5). To deny debtor's discharge based upon a failure to satisfactorily explain any loss or deficiency of assets, the plaintiff “must introduce more than merely an allegation that the debtor has failed to explain losses ... the objector must produce some evidence of the disappearance of substantial assets or of an unusual transaction which disposed of assets.” In re Lord, 244 B.R. 196 (quoting LaBrioche, Inc. v. Ishkhanian (In re Ishkhanian), 210 B.R. 944, 953 (Bankr. E.D.Pa. 1997)).

This Count refers to a financial statement attached as Exhibit C to the complaint. This financial statement was not put into evidence at trial. Further, there is no specification in the complaint or in the exhibit as to what assets are in question. To survive an allegation under this section, the Debtor must only explain a loss or deficiency. The Court finds the Plaintiff has not met its burden even in describing what assets are in question. Further, through the Debtor's testimony and voluminous evidence submitted at trial, the Court finds that, to the extent necessary, the Debtor has satisfactorily explained the changes in his financial condition, including the disposition or transfer of assets. Therefore, Count VI is denied.

CONCLUSION

The Court denies all Counts of Plaintiff'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 7th day of March, 2002, at Manchester, New Hampshire.

Mark W. Vaughn
Chief Judge