

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

In re:

Bk. No. 01-11816-JMD
Chapter 7

Edward G. Clark,
Debtor

Premier Capital, Inc.,
Plaintiff

v.

Adv. No. 01-1157-JMD

Edward G. Clark,
Defendant

Randall L. Pratt, Esq.
LAW OFFICES OF RANDALL L. PRATT
Attorney for Plaintiff

Gillian Morrison, Esq.
Attorney for Debtor/Defendant

MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it a six count amended complaint filed by Premier Capital, Inc. (“Premier Capital”) seeking to deny the Debtor a discharge 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. FACTS

On September 15, 1989, the Debtor purchased real estate located at 552 North Littleton Road in Littleton, New Hampshire (the “Property”) for \$85,000.00. The Debtor obtained a mortgage in the amount of \$68,000.00 to fund the purchase. When the Debtor purchased the Property it contained a barn. In 1993, the barn was destroyed by fire. The Debtor began reconstructing the barn but lacked sufficient funds to complete it. As a result, the Debtor entered into an agreement with Randy Patch (“Patch”) regarding reconstruction and use of the barn, which agreement was memorialized by a handwritten lease dated February 1, 2000 (the “Lease Agreement”). The Lease Agreement required Patch to complete repairs to the barn at his expense and to pay \$200.00 per month in rent. In exchange, Patch could use the barn and would be entitled to a \$200.00 per month credit toward his construction expenses. The term of the lease was twenty-five years. In addition, after twenty-five years, Patch would be entitled to purchase the Property from the Debtor for \$1.00.¹

Patch testified that he spent \$9,200.00 finishing the barn. He further testified that his rental credit would expire in October 2003, and he would begin to pay rent at the rate of \$200.00 per month beginning November 2003. Patch has operated an auto repair business at the Property since completing reconstruction of the barn. At the time of trial, Patch was also residing at the Property. To date, Patch has not paid the Debtor any money on account of the Lease Agreement. Patch testified that he does not intend to vacate the Property. He considers his arrangement with the Debtor “a pretty good deal.”

¹ The Debtor testified that he intended to subdivide the Property to permit Patch to buy the barn alone, not the entire parcel.

In 1999, Premier Capital obtained a judgment against the Debtor in the amount of \$185,216.49. The judgment relates to a deficiency obtained by Premier Capital's predecessor-in-interest with respect to the foreclosure of commercial real estate owned by the Debtor in Littleton. Premier Capital sought to work out a repayment plan with the Debtor. When that failed, Premier Capital brought suit against the Debtor seeking to recover its judgment. In connection with a hearing in state court on April 11, 2001, the Debtor prepared a financial affidavit for Premier Capital (the "Financial Affidavit"). The Financial Affidavit was actually prepared at the courthouse and signed and notarized there. The Financial Affidavit listed the Property as having a value of \$67,000.00, subject to a mortgage in the outstanding amount of \$60,000.00. The Debtor testified that at the time he filled out the Financial Affidavit he did not have access to his financial records. In addition, he did not have an attorney review it for him. The Debtor further testified that he informed Premier Capital's attorney that he was not certain about the value of the Property nor the amount owed on it. The Debtor believed that, in addition to the mortgage, the Property was subject to some attachment liens. At the time the Debtor completed the Financial Affidavit, the Debtor owed less than \$50,000.00 on the mortgage encumbering the Property. As of April 20, 2001, the outstanding principal balance was \$46,245.14 as evidenced by an invoice from the mortgage holder.

The Financial Affidavit did not list the Lease Agreement as either an asset or a liability. The Debtor testified that it was not his intent to put incorrect numbers on the Financial Affidavit. The Debtor testified that he thought he was going to lose his house, and he completed the Financial Affidavit as part of an attempt to reach some arrangement with Premier Capital.

Based on the Financial Affidavit, Premier Capital agreed to accept payment of \$200.00 per month on account of its judgment. The parties entered into a written agreement that required the

\$200.00 per month payments to commence on May 15, 2001. The agreement was without prejudice to Premier Capital taking action against the Property to collect its judgment. The written agreement was approved by the state court on April 11, 2001. It is undisputed that the Debtor did not make the agreed-upon payments.

A representative from Premier Capital testified that when Premier Capital attempted to verify the information contained in the Financial Affidavit, it encountered some discrepancies. First, it discovered that the Debtor was renting the Property to a tenant. Second, it discovered that the Town of Littleton had assessed the property as being worth almost \$77,000.00. The June 11, 2001 real estate tax bill indicated that the taxed assessed value of the Property was \$76,700.00. Third, Premier Capital learned that the amount outstanding on the mortgage was less than what the Debtor had disclosed.

On May 29, 2001, the Debtor filed a Chapter 7 bankruptcy petition. Edmond J. Ford was appointed Chapter 7 trustee (the "Trustee"). The Debtor listed the Property on Schedule A as being worth \$68,000.00. He also stated in Schedule D that the outstanding balance on his mortgage totaled \$46,245.00. The Debtor did not disclose the Lease Agreement anywhere on his statement of financial affairs or schedules, including Schedule G which required the Debtor to "[d]escribe all executory contracts of any nature and all unexpired leases of real or personal property."

On June 29, 2001, the Trustee conducted the first meeting of creditors. At that meeting the Debtor represented to the Trustee that the Property was worth \$76,700.00, the assessed value of the Town of Littleton. The Debtor was asked by the Trustee if he had listed all of his assets and his liabilities on his bankruptcy petition. The Debtor responded that he had. The Debtor made no mention of the Lease Agreement during the meeting.

Within a few days of the first meeting of creditors, the Debtor contacted a realtor to obtain a value for the Property. The Debtor obtained a market analysis for the Property as of July 2001 that estimated the value of the Property at \$93,500.00, exclusive of the value of the barn. The realtor noted that “[n]o value was put on large garage because of ownership of such and arrangement between owner and tenant is unknown.” Premier Capital had previously obtained an estimate of value for the Property of between \$159,000.00 and \$169,000.00.

The Trustee testified at trial that he would have expected the Debtor’s relationship with Patch to have been listed on the Debtor’s schedules. The Trustee also testified that the existence of the Lease Agreement certainly would have affected the Property and its value. The Trustee further indicated that the Debtor, in his view, did not fully and accurately describe the Property on his schedules.

III. DISCUSSION

Premier Capital seeks to deny the Debtor a discharge pursuant to section 727(a)(2) and (a)(4)(A). Section 727(a) 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, has 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). In order to prevail under section 727(a), the plaintiff must demonstrate by a preponderance of the evidence that all of the elements of the section have been met. See Rhode Island Depositors Econ. Prot. Corp. v. Hayes (In re Hayes), 229 B.R. 253, 259 (B.A.P. 1st Cir. 1999). For purposes of section 727(a)(4)(A), once it appears that an oath is false, the burden falls on the debtor to come forward with evidence that he has not committed the offense charged. See Boroff v. Tully (In re Tully), 818 F.2d 106, 110 (1st Cir. 1987).

The requirements for denial of discharge are construed liberally in favor of the debtor. See Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997) (quoting Tully, 818 F.2d at 110); Schreiber v. Emerson (In re Emerson), 244 B.R. 1, 19 (Bankr. D.N.H. 1999). “A debtor is entitled to a starting presumption that most debtors are honest and do not ordinarily engage in fraudulent activity.” Emerson, 244 B.R. at 19 (citing Francis v. Riso (In re Riso), 74 B.R. 750, 756 (Bankr. D.N.H. 1987)).

“The purpose of certain sections of the Bankruptcy Code . . . 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. (citing Palmacci, 121 F.3d at 786; Tully, 818 F.2d at 110). “The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction.” Tully, 818 F.3d at 110.

A. Count I under 11 U.S.C. § 727(a)(2)

In Count I, Premier Capital requests that the Court deny the Debtor a discharge on the grounds that the Debtor concealed his interest in the Lease Agreement, with intent to hinder, delay, or defraud a creditor, by failing to list the Lease Agreement on the Financial Affidavit. It is undisputed that the Debtor did not list the Lease Agreement on the Financial Affidavit. It is also undisputed that the Debtor completed the Financial Affidavit during the course of a court hearing, without the assistance of counsel and without having any records before him to which he could refer.

It is not clear to the Court where the Lease Agreement should have been listed on the Financial Affidavit. At the time the Financial Affidavit was completed in April 2001, the Debtor was not receiving any money from Patch under the terms of the Lease Agreement. Presumably then the Debtor would not have been required to list the Lease Agreement under the “monthly income” section or under the “housing costs” subsection referencing amounts paid by roommates. It appears that the Debtor may have been required to list the Lease Agreement and/or the fact that Patch was obligated to pay rent commencing November 2003 under the section “does anyone owe you money.” However, the purpose of the hearing was to determine the amount of periodic payments which the Debtor would be compelled to pay to Premier Capital on account of its judgment, and it is undisputed that the Lease Agreement would not generate any cash flow for the Debtor for several years.

The Court finds that Premier Capital has presented insufficient evidence to warrant a finding that the Debtor failed to disclose the Lease Agreement on the Financial Affidavit with intent to hinder, delay, or defraud Premier Capital. For that reason, the Court concludes that Premier Capital has not met its burden of proof under section 727(a)(2). Count I is hereby denied.

B. Count II under 11 U.S.C. § 727(a)(2)

In Count II, Premier Capital seeks an order denying the Debtor a discharge on the grounds that the Debtor concealed his interest in the Lease Agreement, with intent to hinder, delay, or defraud a creditor, by failing to list the Lease Agreement on his bankruptcy petition and by failing to disclose it at the first meeting of creditors. It is undisputed that the Lease Agreement was not disclosed on the Debtor's schedules or at the first meeting of creditors. By omitting any reference to the Lease Agreement, the Debtor concealed its existence and his future right to collect rent from Patch. The Debtor's concealment occurred at the time his petition was filed and continued through the date of the first meeting of creditors. The Lease Agreement was only discovered at the time the market analysis was conducted in June/July of 2001.

Accordingly, the first three elements under section 727(a)(2) have been met, i.e., (1) the Debtor has concealed, (2) his property or property of the estate, (3) within one year of the bankruptcy filing or after the petition was filed. See Hayes, 229 B.R. at 259. The last requirement under section 727(a)(2) is that the Debtor concealed his property "with the intent to hinder, delay, or defraud a creditor." See id. The Court finds that Premier Capital has failed to meet its burden of proof on this element. The Debtor testified that he was not receiving any money on account of the Lease Agreement at the time the petition was filed, at the time the first meeting of creditors was held, and at the time of trial. In the Debtor's mind, the Lease Agreement contained no benefit for creditors as it was not generating any source of income for the Debtor. For that reason, the Court concludes that the Debtor did not possess the requisite fraudulent intent in failing to disclose the Lease Agreement on his petition and at the first meeting of creditors. Count II must be denied.

C. Count III under 11 U.S.C. § 727(a)(2)

In Count III, Premier Capital seeks denial of the Debtor's discharge on the grounds that the Debtor, with intent to hinder, delay, or defraud a creditor, understated the value of the Property and overstated the amount due on his mortgage and thus concealed his equity in the Property, all on the Financial Affidavit. On its face, the Financial Affidavit clearly overstated the amount due on the Debtor's mortgage. The Financial Affidavit indicates that the Debtor owed \$60,000.00 as of April 11, 2001. The Debtor's mortgage statement dated April 20, 2001 indicates that the outstanding principal balance was \$46,245.14. The Debtor testified at trial that the \$60,000.00 amount listed on the Financial Affidavit approximated the value of the liens that had attached to his property, which included not only the mortgage but liens held by the Internal Revenue Service and a pool installation company.

With respect to the value of the Property, it is unclear to what extent the Debtor may have underestimated its value. The Property was assessed by the Town of Littleton at a value of \$76,700.00. Premier Capital had obtained a drive-by appraisal of the Property at a value of between \$159,000.00 and \$169,000.00. The Debtor obtained a market appraisal valuing the Property at \$93,500.00, excluding the barn. The Debtor paid \$85,000.00 for the Property in 1989. The Debtor testified, however, that he had lost several parcels of real estate to foreclosure during the 1990s where the amounts recovered were substantially less than the amounts he had paid for the properties. According to the Debtor, this led him to believe that property values in the Littleton area had decreased during the 1990s. The Debtor also testified that the Property was in need of some repairs.

While the Court might conclude, given the evidence, that the Debtor undervalued the Property to some extent on the Financial Affidavit, the Court cannot conclude that the Debtor did

so with fraudulent intent to harm Premier Capital. Based upon the Debtor's actual experience with real estate values, his belief that values in the Littleton area had decreased was not without some basis. Accordingly, the Court finds that Premier Capital has not met its burden of proof under section 727(a)(2). Count III is denied.

D. Count IV under 11 U.S.C. § 727(a)(2)

In Count IV, Premier Capital seeks an order denying the Debtor a discharge on the grounds that the Debtor, with intent to hinder, delay, or defraud a creditor, understated the value of the Property and thus the equity in the Property on his bankruptcy petition and at the first meeting of creditors. The Debtor listed the value of the Property at \$68,000.00 on Schedule A to his petition. At the first meeting of creditors, he indicated that the Property was worth \$76,700.00, the amount assessed by the Town of Littleton. These values are basically consistent with the \$67,000.00 value listed on the Financial Affidavit. While the Debtor may have understated the value of the Property by listing it at \$68,000.00, Premier Capital has not shown that the Debtor understated the value of the Property with fraudulent intent. Accordingly, Count IV of the amended complaint must be denied.

E. Count V under 11 U.S.C. § 727(a)(4)(A)

In Count V, Premier Capital seeks to deny the Debtor a discharge on the grounds that the Debtor knowingly and fraudulently made a false oath on his bankruptcy petition when he failed to disclose the Lease Agreement and when he undervalued the Property. A debtor's schedules are unsworn declarations made under penalty of perjury and are the equivalent of a verification under oath. Smith v. Grondin (In re Grondin), 232 B.R. 274, 276 (B.A.P. 1st Cir. 1999); Emerson, 244 B.R. at 26.

It is undisputed that the Debtor did not list the Lease Agreement on his schedules. Schedule G specifically required the Debtor to “[d]escribe all executory contracts of any nature and all unexpired leases of real or personal property,” “[s]tate whether debtor is lessor or lessee of a lease,” and “[p]rovide the names and complete mailing addresses of all other parties to each lease or contract described.” The Lease Agreement clearly is a lease and it should have been listed. By listing “none” the Debtor made a false statement under oath.

Section 727(a)(4)(A) requires that the false oath relate to a material fact. A fact is material when it bears a relationship to the debtor’s business transactions or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor’s property. Tully, 818 F.2d at 110-11; Grondin, 232 B.R. at 276. Trivial matters that have little effect upon the estate and the creditors are treated as immaterial. Gordon v. Murkejee (In re Murkejee), 98 B.R. 627, 629 (Bankr. D.N.H. 1989).

The Debtor’s false statement was material because the Lease Agreement set forth an important business and financial arrangement between the Debtor and Patch. Pursuant to the Lease Agreement, the Debtor was obligated to rent the barn to Patch and Patch was obligated to pay rent to the Debtor once he received credit for construction expenses. In addition, the Lease Agreement provided Patch with an option to purchase the Property in twenty-five years. While the Lease Agreement did not result in any present income to the Debtor and thus no present benefit to creditors, these facts do not affect the Debtor’s obligation under the Bankruptcy Code to disclose it. See LaVangie v. Mazzola (In re Mazzola), 4 B.R. 179, 183 (Bankr. D. Mass. 1980) (quoting In re Slocum, 22 F.2d 282, 285 (2d Cir. 1927)) (“The fact that property may be without value is not determinative of whether it should be disclosed . . . ‘[T]he materiality of the false oath will not depend upon whether in fact the falsehood has been detrimental to the creditors.’”).

The cases are clear that a debtor's discharge should not be denied under section 727(a)(4)(A) if the false statement or omission was due to mistake or inadvertence. See Murkejee, 98 B.R. at 629. However, a debtor's reckless indifference to the truth has consistently been treated as the functional equivalent of fraud. Tully, 818 F.2d at 112; Grondin, 232 B.R. at 277-78; Mazzola, 4 B.R. at 182 ("A reckless disregard of both the serious nature of the information sought and the necessary attention to detail and accuracy in answering may rise to the level of fraudulent intent necessary to bar a discharge."). The Debtor testified that he did not believe he had to disclose the Lease Agreement. In his mind, it did not make any difference whether the Lease Agreement was disclosed on his petition because if the Property were sold in bankruptcy both he and Patch would be required to vacate it. The Debtor's testimony suggests that he made a conscious decision not to include the Lease Agreement on Schedule G, despite knowing it was a lease and possibly should have been included.

The Debtor testified that he had previously owned an apartment building in which he leased apartments to tenants. The Lease Agreement was based in part on a copy of a lease agreement the Debtor had previously used. The Debtor and Patch testified that they negotiated the Lease Agreement over the span of a few days. The evidence shows that the Debtor took great care to handwrite the five pages constituting the Lease Agreement. The Lease Agreement is entitled "Lease agreement between Randy Patch of Patch's Auto Body Lessee, and Edward Clark Owner of 552 N. Littleton Rd. property in Littleton, NH 03561 Lessor." The Lease Agreement is replete with references to "lessor" and "lessee."

Given this evidence, it is difficult to understand how the Debtor did not know the meaning of the word "lease" on Schedule G or could have inadvertently omitted the Lease Agreement. Schedule G contains the term "lease" in all capital letters in the heading and mentions "leases of

real or personal property” and “lessor” and “lessee.” There was no evidence that the Debtor mentioned the Lease Agreement to his lawyer, that he asked her whether the Lease Agreement was the type of lease that should be listed, or that she informed him not to list the Lease Agreement on Schedule G. Rather, the evidence leads to the Court to conclude that the Debtor intentionally left the Lease Agreement off Schedule G because he did not think it was necessary to include it. Yet the Debtor conceded that he did not understand the legal importance of portions of the Lease Agreement. “The determination of relevance and importance of the question is not for the debtor to make. It is the debtor’s role simply to consider the question carefully and answer it completely and accurately.” Mazzola, 4 B.R. at 182. The omission of the Lease Agreement without an understanding of the legal meaning of its provisions and without seeking legal advice was reckless. The Debtor’s reckless indifference to the truth is sufficient to find that the Debtor knowingly and fraudulently made a false oath.

The Debtor argues that he did not conceal his arrangement with Patch because anyone who drove by the Property could see the sign for Patch’s Auto Body and realize that the Debtor was leasing the Property to him. However, the Bankruptcy Code does not require the Trustee or the Debtor’s creditors to conduct an exhaustive investigation into the Debtor’s affairs. Rather, the Debtor has the obligation to place his financial affairs before them by filing a complete and accurate petition, schedules, and statement of financial affairs with the Court. See Tully, 818 F.2d at 111 (“A petitioner cannot omit items from his schedules, force the trustee and the creditors, at their peril, to guess that he has done so—and hold them to a mythical requirement that they search through a paperwork jungle in the hope of finding an overlooked needle in a documentary haystack.”).

As the First Circuit Court of Appeals has stated, “[s]worn statements filed in any court must be regarded as serious business. In bankruptcy administration, the system will collapse if debtors are not forthcoming.” *Id.* at 112. Because the Court finds that the Debtor was not forthcoming, his discharge must be denied under section 727(a)(4)(A) for knowingly and fraudulently making a false oath in connection with his bankruptcy case. Premier Capital’s claim under Count V is granted.

F. Count VI under 11 U.S.C. § 727(a)(4)(A)

In Count VI, Premier Capital seeks to deny the Debtor a discharge on the grounds that the Debtor knowingly and fraudulently made a false oath at the first meeting of creditors when he undervalued the Property and when he represented to the Trustee that he had disclosed all of his assets and his liabilities. The Court has discussed above the issue of the Debtor undervaluing the Property. The evidence does not support a finding that the Debtor intentionally and fraudulently undervalued the Property at the first meeting of creditors. The Court also finds that the Debtor did not knowingly and fraudulently make a false oath when he indicated at the first meeting of creditors that he had disclosed all of his assets and his liabilities. In the Debtor’s mind he did not consider the Lease Agreement an asset or a liability. At the time the Debtor filed his bankruptcy case he was not receiving any present income nor was the Debtor making any payments to Patch on account of the Lease Agreement. It is difficult for the Court to conclude that the Debtor knowingly and fraudulently made a false oath in that regard. Accordingly, Count VI must be denied.

IV. CONCLUSION

For the reasons outlined above, the Court denies Counts I, II, III, IV, and VI and grants Count V of Premier Capital’s amended complaint. The Debtor’s discharge is denied pursuant to

section 727(a)(4)(A) because the Debtor knowingly and fraudulently made a false oath on Schedule G when he stated that he did not have any unexpired leases. 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 16th day of May, 2002, at Manchester, New Hampshire.

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge