

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

In re:

Bk. No. 01-12240-JMD  
Chapter 7

David O. Liimatainen and  
Diana L. Liimatainen,  
Debtors

Steven M. Notinger,  
Chapter 7 Trustee,  
Plaintiff

v.

Adv. No. 01-1218-JMD

David O. Liimatainen and  
Diana L. Liimatainen,  
Defendants

*Christopher J. Seufert, Esq.*  
*SEUFERT PROFESSIONAL ASSOCIATION*  
*Attorney for Plaintiff*

*Grenville Clark, III, Esq.*  
*GRAY, WENDELL & CLARK, PC*  
*Attorney for Debtors/Defendants*

**MEMORANDUM OPINION**

**I. INTRODUCTION**

The Court has before it a complaint filed by Steven M. Notinger, Chapter 7 Trustee (the “Trustee”), against David and Dianna Liimatainen (the “Debtors”) in which the Trustee seeks to deny the Debtors their discharge pursuant to 11 U.S.C. § 727(a)(2), (a)(3), (a)(4)(A), and/or (a)(5). The Court conducted a two day trial of this matter on July 25 and 26, 2002. The Court

took the matter under submission and gave the parties time to file post-trial memorandum, which they did. The Trustee also filed a post-trial motion to amend his complaint to add a cause of action under 11 U.S.C. § 727(a)(4)(D) to which the Debtors object.

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**

In 1977, Mr. Liimatainen began working in the construction business as a sole proprietor. On December 31, 1985, he formed a corporation known as Generation Builders, Inc. (“Generation Builders”). Mr. Liimatainen was the sole shareholder of Generation Builders, and he and his wife were the officers. During 1998 Generation Builders performed construction work for Steven and Caroline Anstey (the “Ansteys”). When the Ansteys refused to pay for services and materials, Generation Builders brought a lawsuit against them in state court. The Ansteys asserted a counterclaim alleging that Generation Builders performed its work defectively. On January 28, 2000, a jury trial verdict issued in favor of the Ansteys against Generation Builders on both Generation Builders’ claim and the Ansteys’ counterclaim. The Ansteys were awarded \$60,000.00.

On February 8, 2000, Mr. Liimatainen executed articles of incorporation for a new company known as Three Generation Builders, Inc. (“Three Generation”) to be effective February 17, 2000. Mr. Liimatainen was the sole shareholder of the new company, and he and his wife

were the officers. Like Generation Builders, which then stopped operating, Three Generation performed general contracting and construction services.

When Generation Builders failed to pay the Ansteys' judgment against it, the Ansteys filed a motion in state court seeking to hold Three Generation and the Debtors, individually, liable for the obligation on the grounds that Generation Builders and the Debtors fraudulently formed Three Generation solely in an attempt to avoid payment of the jury verdict. The Ansteys argued that they were entitled to pierce the corporate veil to reach Three Generation and the Debtors and hold them liable for the judgment. On October 27, 2000, the state court issued an order requiring notice to be provided to Three Generation and the Debtors that they were being added as parties to the action so that the Ansteys could pursue Three Generation and the Debtors, individually, in collecting the judgment.

According to John Donnelly, a friend of the Debtors, Mr. Liimatainen mentioned his financial difficulties to Mr. Donnelly in the fall of 2000. Mr. Donnelly testified that he had conversations during the 2000 holiday season with Edward Malila, Mr. Liimatainen's brother-in-law, about starting a new company that would perform construction services. Mr. Liimatainen indicated at trial that he learned about the new company in January 2001. On February 9, 2001, both Mr. Liimatainen and Mr. Donnelly executed certificates of formation for a limited liability company to be known as Eagle's Nest Builders, LLC ("Eagle's Nest"). Mr. Donnelly also executed an addendum to the certificates that same day. In addition, Mr. Donnelly and Mr. Malila executed an operating agreement for Eagle's Nest on February 9, 2001, which also was signed by Mr. Liimatainen as manager. None of the formation documents for Eagle's Nest indicate that Mr. Liimatainen or his wife were receiving any ownership interest in Eagle's Nest. Rather, the members of Eagle's Nest were listed as Mr. Donnelly and Mr. Malila, who each contributed

\$2,500.00 in capital at the time of the company's formation. On April 2, 2001, Mr. Liimatainen was officially hired to serve as the manager of Eagle's Nest when he signed an agreement outlining the terms of his employment.

The Ansteys continued their efforts to obtain satisfaction of their judgment in 2001. On March 2, 2001, they apparently obtained a real estate attachment on the Debtors' residence. On June 5, 2001, they filed a motion for summary judgment in state court seeking to hold Three Generation and the Debtors, individually, liable for the verdict rendered against Generation Builders. Three Generation and the Debtors were given thirty days to respond to the motion. Instead of filing a response in state court, the Debtors filed a petition with this Court under Chapter 7 of the Bankruptcy Code on July 6, 2001.

On their statement of financial affairs in the bankruptcy case, the Debtors listed Generation Builders and Three Generation as businesses in which they held positions as officers and/or directors. On Schedule B, they listed one hundred percent stock ownership in Generation Builders and Three Generation, but did not list any ownership interest in the recently established Eagle's Nest. Mr. Liimatainen disclosed that he was employed by Eagle's Nest as its construction manager.

On December 11, 2001, the Trustee filed a complaint seeking to deny the Debtors their discharge pursuant to various subsections of section 727(a) of the Bankruptcy Code. During the course of discovery, the Trustee requested various financial documents from the Debtors, individually, and from Generation Builders and Three Generation. The Debtors produced some but not all of the requested documents.

### III. DISCUSSION

The Trustee's complaint is generally based upon the allegation that the Debtors are the actual owners of Eagle's Nest but have failed to list that ownership interest in their schedules. In his motion to amend the complaint, the Trustee seeks to deny the Debtors their discharge for failing to produce financial documents of Three Generation.

“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 (1<sup>st</sup> Cir. 1997) (quoting Boroff v. Tully (In re Tully), 818 F.3d 106, 110 (1<sup>st</sup> Cir. 1987)). A debtor is entitled to a starting presumption that most debtors are honest and do not ordinarily engage in fraudulent activities. Schreiber v. Emerson (In re Emerson), 244 B.R. 1, 19 (Bankr. D.N.H. 1999) (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 ensure 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. Palmacci, 121 F.3d at 786 (citing 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.2d at 110. The burden is on the objecting party to establish grounds for denying a debtor his discharge and the elements must be established by a preponderance of the evidence. See Rhode Island Depositors Econ. Prot. Corp. v. Hayes (In re Hayes), 229 B.R. 253, 259 (B.A.P. 1<sup>st</sup> Cir. 1999) (citing 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); Gillickson v. Brown (In re Brown), 108 F.3d 1290, 1293 (10<sup>th</sup> Cir. 1997); Lansdowne v. Cox (In re Cox), 41

F.3d 1294, 1297 (9<sup>th</sup> Cir. 1994); Barclays/American Business Credit, Inc. v. Adams (In re Adams), 31 F.3d 389, 393-94 & n.1 (6<sup>th</sup> Cir. 1994); Montey Corp. v. Maletta (In re Maletta), 159 B.R. 108 (Bankr. D. Conn. 1993)); Riso, 74 B.R. at 756; Fed. R. Bankr. P. 4005.

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, 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;

(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;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

...

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(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)(2), (a)(3), (a)(4)(A), (a)(4)(D), and (a)(5).

### **A. Objection to Discharge under 11 U.S.C. § 727(a)(2)**

In his complaint, the Trustee requests that the Court deny the Debtors their discharge pursuant to section 727(a)(2) on the grounds that they have transferred, removed, or concealed assets with fraudulent intent by transferring the assets of Generation Builders to Three Generation and then from Three Generation to Eagle's Nest. In order to meet the requirements of section 727(a)(2), the Trustee must establish by a preponderance of the evidence:

1. The Debtors, or their duly authorized agent, transferred, removed, destroyed, or concealed the Debtors' property or property of the bankruptcy estate;
2. The Debtors did so within one year before the date their bankruptcy petition was filed or after the petition was filed; and
3. The Debtors did so with actual intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under the Bankruptcy Code.

See Hayes, 229 B.R. at 259. 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 (1<sup>st</sup> Cir. 1992).

The facts demonstrate that Mr. Liimatainen, the sole shareholder of Generation Builders, discontinued that corporation's operations and formed Three Generation in the winter of 2000, which is more than a year prior to the Debtors' bankruptcy filing on July 6, 2001, and thus outside the actionable time period set forth in section 727(a)(2). In addition, the Trustee presented no evidence that would prove that Mr. Liimatainen transferred or concealed his stock interest in Generation Builders, the only interest of the Debtors related to Generation Builders that constitutes part of the Debtors' bankruptcy estate. In fact, the Debtors listed this stock interest on Schedule B to the bankruptcy petition. The facts further demonstrate that Three Generation is owned by Mr. Liimatainen. Mr. Liimatainen listed his stock interest in the corporation on Schedule B to his bankruptcy petition. There is no evidence that would support a finding that Mr. Liimatainen

transferred this stock interest to Eagle's Nest or that he concealed it. The Trustee seeks to ignore the reality that Mr. Liimatainen conducted his construction activities after 1985 through corporate entities, i.e., Generation Builders, Three Generation, and Eagle's Nest, and that the Trustee's only interest in these corporate entities is Mr. Liimatainen's stock interest in Generation Builders and Three Generation and not in the assets and liabilities of each company. While the Trustee argues that a continuity of ownership theory requires the Court to treat the corporate entities as alter egos of the Debtors, he has cited no authority for that proposition in the context of a denial of discharge proceeding. The Court is not persuaded that such a theory can be used to deny the Debtors their discharge in this case. Thus, any transfer of assets, or liabilities, from one corporate entity to another is no grounds for denying the Liimatainens a discharge under section 727(a)(2), which requires the fraudulent transfer or concealment of the Debtors' or the bankruptcy estate's property.<sup>1</sup> For these reasons, the Court must deny the Trustee's claim under section 727(a)(2).

**B. Objection to Discharge under 11 U.S.C. § 727(a)(4)(A)**

The Trustee seeks to deny the Debtors their discharge pursuant to section 727(a)(4)(A) on the grounds that they knowingly and fraudulently gave a false account of their financial situation when they failed to list their alleged ownership interest in Eagle's Nest on their bankruptcy petition. To establish his claim under section 727(a)(4)(A), the Trustee must prove:

1. The Debtors made a false oath or account;
2. The Debtors did so knowingly and fraudulently; and
3. The false oath or account related to a material fact.

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<sup>1</sup> The result in this case might be different if the corporate entities were also debtors under the Bankruptcy Code. See Groman v. Watman (In re Watman), 301 F.3d 3 (1<sup>st</sup> Cir. 2002).



See, e.g., Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 764 (1<sup>st</sup> Cir. 1994); Tully, 818 F.2d at 110. A fact is material when it bears a relationship to a debtor's business transactions or concerns the discovery of assets, business dealings, or the existence or disposition of the debtor's property. See Tully, 818 F.2d at 110-11; Smith v. Grondin (In re Grondin), 232 B.R. 274, 276 (B.A.P. 1<sup>st</sup> Cir. 1999).

The Court agrees that failure to list an ownership interest in a limited liability company may be grounds for denying a debtor his discharge under section 727(a)(4)(A) where the debtor did so knowingly and fraudulently. In the instant case, the Trustee has failed to prove that the Debtors have any type of ownership interest in Eagle's Nest. The undisputed testimony from Mr. Liimatainen and Mr. Donnelly is that Mr. Donnelly and Mr. Malila each hold a fifty percent interest in Eagle's Nest and that they capitalized the company by each making a \$2,500.00 contribution. The Trustee argues that Mr. Donnelly's and Mr. Malila's limited contact with Eagle's Nest suggests that Mr. Liimatainen is the true owner. The Court does not find this argument persuasive. The Trustee also suggests that the contradictory testimony regarding the formation of Eagle's Nest, i.e., who drafted the documents and met with the company's attorney, requires the Court to find that the Debtors are the true owners of Eagle's Nest. Such a finding is not compelled by the evidence. Accordingly, absent other evidence that would establish that Mr. Liimatainen and/or his wife are the actual owners of Eagle's Nest, the Court must deny the Trustee's claim under section 727(a)(4)(A) because he failed to prove by a preponderance of the evidence that either of the Debtors made a false oath or account.

**C. Objection to Discharge under 11 U.S.C. § 727(a)(5)**

To meet the requirements for denying a discharge under section 727(a)(5), the Trustee must establish:

1. The Debtors have experienced a loss of assets or deficiency of assets; and
2. The Debtors cannot provide a satisfactory explanation for such loss.

See 6 Collier on Bankruptcy ¶ 727.08 (Lawrence P. King et al. eds., 15<sup>th</sup> ed. rev. 2002). In the complaint, the Trustee seeks to deny the Debtors their discharge under section 727(a)(5) on the grounds that they have failed to satisfactorily explain the loss of assets, a major construction job worth at least \$265,400.00. The Trustee apparently abandoned this claim at trial and made no reference to it in his post-trial brief. Rather, the Trustee argues in his post-trial memorandum that Mr. Liimatainen should be denied his discharge under section 727(a)(5) because he failed to explain why he “dismantled” Three Generation or why Eagle’s Nest failed to pay Three Generation for its goodwill, employees, or customer list.

Again, the Trustee ignores the separate corporate identities of the entities involved. The goodwill, employees, and customer list of Three Generation are not assets of the Debtors and therefore are not assets of their bankruptcy estate. Therefore, any loss or reduction of these assets cannot form the basis for denying either of the Liimatainens a discharge. The Trustee’s claim under section 727(a)(5) must be denied.

**D. Objection to Discharge under 11 U.S.C. § 727(a)(3)**

The Trustee seeks to deny the Debtors their discharge under section 727(a)(3) on the grounds that (1) they have concealed, or failed to keep or preserve, recorded information about their financial condition and property within the last year in an attempt to delay and/or defraud their creditors and the Trustee; and (2) they have failed to preserve, or have destroyed, records for

Three Generation, which information was necessary to determine the Debtors' financial condition.

To deny the Debtors their discharge under section 727(a)(3), the following elements must be proven:

1. A failure by the Debtors to keep or preserve any recorded information, including books, documents, records, and papers; or
2. An act of destruction, mutilation, falsification, or concealment of any recorded information, including books, documents, records, and papers by the Debtors or someone acting for the Debtors; and
3. It is impossible to ascertain the financial condition and material business transactions of the Debtors because of the failure to keep such books or records or the destruction, mutilation, falsification, or concealment of such books or records.

See 6 Collier on Bankruptcy ¶ 727.03[4].

An individual debtor's failure to maintain books and records of a corporation is not in itself sufficient to deny that debtor a discharge under § 727(a)(3) because an objection to discharge must be based on the debtor's failure to produce books and records which depict the individual debtor's finances, not that of his or her corporation. . . . The corporation must be treated as an entity separate and distinct from the individual debtor. . . . That is not to say, however, that the books and records of a debtor's corporation are never relevant to ascertaining that individual debtor's financial status. In certain cases, a debtor may substitute the books and records of a corporation for his or her own if they accurately portray that debtor's finances.

Krohn v. Cromer (In re Cromer), 214 B.R. 86, 99 (Bankr. E.D.N.Y. 1997) (citing Phillips v. Nipper (In re Nipper), 186 B.R. 284, 289 (Bankr. M.D. Fla. 1995)). See also Marshall v. Kalantzis (In re Kalantzis), 2001 BNH 009, 8 (Section 727(a)(3) "requires the Debtor to keep books and records from which his financial condition can be met. The Court fails to see how the books and records of a corporation, in which the Debtor was previously a shareholder, are essential to determining the Debtor's financial condition."), aff'd, Kalantzis v. Marshall (In re Kalantzis), BAP No. NH 01-033 (B.A.P. 1<sup>st</sup> Cir. Nov. 14, 2001); Blanchard v. Ross (In re Ross), No. 97-19956DWS, 98-0246, 1999 WL 10019, at \*4 (Bankr. E.D. Pa. 1999) ("[U]nder

appropriate circumstances a debtor may be denied a discharge based on his failure to keep, maintain or preserve records belonging to a separate, but closely held corporate entity. The facts of each situation must be analyzed with the language and statutory purpose of § 727(a)(3) in mind.”); Phillips v. Nipper (In re Nipper), 186 B.R. 284, 289 (Bankr. M.D. Fla. 1995) (“A debtor’s discharge cannot be denied where production of corporate financial records is inadequate because the corporation is a separate entity. . . . Failure to keep records must be based on defendant’s personal financial records.”) (citing In re More, 138 B.R. 102, 105 (M.D. Fla. 1992) (holding that failure to produce or locate corporate financial records should not deprive the debtor his fresh start, particularly where the corporation had been dissolved for nearly two years before the bankruptcy petition was filed)).

In the instant case, the Trustee seeks to deny the Debtors a discharge under section 727(a)(3), not because the Debtors destroyed, mutilated, falsified, or failed to preserve the cancelled checks of Three Generation but because they concealed them from the Trustee. It is undisputed that the Debtors turned over the check register for Three Generation during discovery and some of the cancelled checks, those from March 2000 to June 13, 2001, on the eve of trial.

In order to meet his burden of proof under section 727(a)(3), the Trustee must demonstrate that the checks of Three Generation are essential to determining the financial condition of the Debtors, individually, and not the financial condition of their corporation. In this regard, the Trustee has failed to make a satisfactory showing. He merely argues that “the withheld cancelled checks could provide evidence that property passed through the debtors[’] hands that they failed to list in their Petition.” He has not shown to the Court’s satisfaction that the cancelled checks would provide a more accurate depiction of the Debtors’ finances than other information that was

provided by the Debtors during discovery. Rather, it appears that the cancelled checks would only shed light on the financial dealings of Three Generation, a separate corporate entity; however, as explained above, failure to turnover corporate records is not actionable under section 727(a)(3) unless such records relate to the Debtors' financial condition. Accordingly, the Trustee's claim under section 727(a)(3) is denied.

**E. Objection to Discharge under 11 U.S.C. § 727(a)(4)(D)**

Post-trial the Trustee filed a motion to amend his complaint to add a cause of action under section 727(a)(4)(D) on the grounds that the Debtors failed to produce cancelled checks of Three Generation after the Trustee requested them on numerous occasions. The Trustee states that the Court may permit amendment of the complaint in order to clarify the legal theory that both parties understood was being tried and on which both sides offered extensive evidence. The Debtors object to the motion on the grounds that the motion does not actually set forth the language of the proposed amendment, it fails to allege that the cancelled checks relate to the Debtors' property or financial affairs and that the Debtors knowingly and fraudulently withheld the cancelled checks, the parties did not offer extensive evidence on section 727(a)(4)(D) issues, and the amendment would be prejudicial.

Motions to amend a complaint post-trial are governed by Federal Rule of Civil Procedure 15(b), incorporated by Federal Rule of Bankruptcy Procedure 7015, which provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial on these issues. . . .

Fed. R. Civ. P. 15(b). Rule 15(b) is intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleadings skills of counsel or on the basis of claims made

at a preliminary point in the action. 6A Charles Alan Wright et al., Federal Practice and Procedure § 1491 (2d ed. 1990). Accordingly, courts in the First Circuit have interpreted this rule liberally. Id. See also Noonan v. Rauh (In re Rauh), 119 F.3d 46, 52 (1<sup>st</sup> Cir. 1997); Jones v. Pineda, 22 F.3d 391, 400 (1<sup>st</sup> Cir. 1994).

The record demonstrates that a considerable amount of time at trial was spent on the issue of the cancelled checks. While the Debtors may have believed that the testimony was being admitted solely for purposes of section 727(a)(3), the Court does not find it prejudicial to permit such testimony to be used to support an added claim under section 727(a)(4)(D). Accordingly, the Court will allow the Trustee's amendment.

The Court may deny the Debtors a discharge under section 727(a)(4)(D) if the Trustee establishes:

1. The Debtors withheld from an officer of the estate any recorded information, including books, documents, records, and papers, relating to the Debtors' property or financial affairs; and
2. The Debtors did so knowingly and fraudulently.

11 U.S.C. § 727(a)(4)(D). As discussed above, the Debtors ultimately turned over corporate checks for the period from March 2000, shortly after Three Generation was incorporated, through June 13, 2001, by which time Mr. Liimatainen was working as the manager for Eagle's Nest. In addition, the Debtors had previously turned over the check register for the Three Generation's account. As the Court found above, the Trustee has failed to establish that these corporate records are sufficiently related to the Debtors' property or financial affairs so as to warrant denial of the Debtors' discharge based on the fact that they were withheld from the Trustee until the eve of trial. Furthermore, the Debtors have offered a reasonable explanation as to why they failed to turn over the cancelled checks in a timely fashion, which explanation is sufficient to overcome any

allegation that the Debtors' actions were done fraudulently. For these reasons, the Trustee's claim under section 727(a)(4)(D) must be denied.

#### **IV. CONCLUSION**

For the reasons outlined above, the Trustee did not satisfy his burden under section 727(a)(2), (a)(3), (a)(4)(A), (a)(4)(D), or (a)(5) of the Bankruptcy Code. Accordingly, his complaint, as amended, is denied, and the Debtors are entitled to receive their 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.

DONE and ORDERED this 10<sup>th</sup> day of October, 2002, at Manchester, New Hampshire.

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