

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF IOWA

In re:  
  
VIRGINIA LORRAINE THOMAS  
Debtor  
  
KENNETH F. DOLEZAL  
Plaintiff

CHAPTER 7  
Case No.

L-92-00524-C

FILED  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF IOWA

SEP 22 1993

BARBARA A. EVERLY, CLERK

v.

VIRGINIA LORRAINE THOMAS  
Defendant

Adversary Proceeding No.  
L-92-0115C

**JUDGMENT**

This proceeding having come on for trial or hearing before the court, the Honorable Paul J. Kilburg, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered,

IT IS ORDERED AND ADJUDGED: Plaintiff's claim, under both Section 727(a)(4) and Section 523(a)(2)(A), are Dismissed. Judgment is entered in favor of Defendant and against Plaintiff for costs of this proceeding. Further, Defendant is granted a reasonable attorney's fee in the amount of \$1,250 against Plaintiff under Section 523(d).



[Seal of the U.S. Bankruptcy Court]  
Date of Issuance: September 22, 1993

BARBARA A. EVERLY  
Clerk of Bankruptcy Court

By: *Michael A. Dolezal*  
Deputy Clerk

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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF IOWA

IN RE:	)	
	)	Chapter 7
VIRGINIA LORRAINE THOMAS,	)	
	)	
Debtor.	)	Bankruptcy No. L-92-00524C
-----	)	
KENNETH F. DOLEZAL,	)	
	)	Adversary No. L-92-0115C
Plaintiff,	)	
	)	
vs.	)	
	)	
VIRGINIA LORRAINE THOMAS,	)	
	)	
Defendant.	)	

FILED  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF IOWA

SEP 22 1993

BARBARA A. EVERLY, CLERK

ORDER

On September 2, 1993, the above-captioned matter came on for trial pursuant to assignment. Plaintiff Kenneth Dolezal appeared pro se. Defendant Virginia Lorraine Thomas (Heising) appeared in person with Attorney Henry Nathanson. Evidence was presented after which the Court took the matter under advisement.

STATEMENT OF THE CASE

Plaintiff is an attorney who represented the Defendant in legal matters pre-bankruptcy. This dispute arises over the alleged nonpayment of Attorney Dolezal's fees for this representation. He has filed a two-part complaint; first, Mr. Dolezal claims that Defendant made false statements and representations to him which preclude discharge of her obligations to him under 11 U.S.C. § 523(a)(2)(A); and secondly, he alleges that Defendant knowingly and fraudulently made a false oath in that she failed to disclose a \$9,000 judgment in her bankruptcy schedules which is an asset of the estate. Mr. Dolezal asserts that she should be denied a discharge under 11 U.S.C. § 727(A)(4)(A).

FINDINGS OF FACT

Defendant retained Plaintiff Dolezal in February of 1984 for the purpose of representing her in child support and contempt proceedings in Iowa District Court against Kevin Kenny. This attorney-client relationship continued until 1987. During that time, various Court proceedings were held and Attorney

Dolezal billed the Defendant for his services. From the commencement of representation through 1987, Defendant paid Mr. Dolezal approximately \$1,100 in attorney's fees. Various periodic payments were made thereafter. It appears that the last installment payment was made in August of 1989.

No written employment or retainer agreement memorializes the attorney-client relationship. It does not appear that there was any other type of clear understanding about the extent of representation other than that Mr. Dolezal would charge \$50 or \$60 per hour for his services. The Court has been presented with various exhibits which consist of billing statements and accompanying correspondence relating to billing and the collection process.

After the attorney-client relationship was terminated in 1987, additional correspondence passed between Plaintiff and Defendant. Without analyzing each particular document, the general sense of the correspondence was that Mr. Dolezal was willing to compromise the bill if the Defendant would pay that balance. At one point, the sum of \$3,000 was discussed as a compromise in order to resolve the outstanding account. In 1989, the figure of \$2,000 was discussed as a possible total payment with periodic payments being made against that amount.

At the time of trial, Attorney Dolezal indicated that he had incurred total fees of \$5,941.50 with an additional \$229 in expenses. He stated that the Defendant had made total payments of \$1,426.50. He testified that there still remains due and owing the sum of \$4,744 as of the time of trial.

On the claim brought under 11 U.S.C. § 523, Mr. Dolezal states that the Defendant misrepresented that she would pay her bill. He admits that she did make periodic payments on the bill over the course of time. However, her representations that she would pay the bill kept him from proceeding toward collection procedures and getting a judgment at an earlier date.

The Defendant claims that there was never any formal agreement as to the total fees that would be incurred or the hourly rate with any exactitude. She stated she did receive billing statements commencing in April of 1984. However, she stated that she was told not to worry about the bills as they would attempt to get Mr. Kenny to pay part of these bills through a Court order and she should just make payments. She stated she tried to make payments on the bill as best she could but that Mr. Dolezal did not provide any organized billing on a regular basis. Ultimately, she testified that she knew she owed him some reimbursement and she tried to make payments but she did not feel she owed \$5,000 or \$6,000.

Finally, Defendant stated that during this period of time she was having financial difficulty. She was employed at AT&T and she made a reasonable income. However, she was not receiving consistent child support from Mr. Kenny. She testified that Mr. Dolezal was well aware of her financial condition which was not good. She testified that she attempted to compromise this bill through correspondence with Mr. Dolezal, however, this was unsuccessful. She testified that she did nothing to misrepresent her position which caused Mr. Dolezal to change his position or to forego any legal action which he might have available to him.

The second issue relates to the Defendant's failure to list a \$9,000 judgment on her schedules. The Defendant admits that she did not list this judgment in the original schedules. It is a \$9,000 child support judgment against Mr. Kenny based on the fact Mr. Kenny was Court ordered to pay child support to the Defendant. The \$9,000 obligation was accumulated over a substantial period of time because of Mr. Kenny's continued failure to pay this obligation. The Defendant testified that she was aware that she was entitled to this sum, though she candidly felt that it would never be collected because of her past inability to do so. She testified that she simply overlooked listing this judgment as an asset because of its uncollectability and because of the fact that this was support for her children. Additionally, Defendant and her present attorney assert that even though this is a judgment, child support is exempt and therefore, should not constitute grounds for denial of discharge under 11 U.S.C. § 727.

#### CONCLUSIONS OF LAW

1. The U.S. Supreme Court has determined that the standard of proof on dischargeability exemptions under 11 U.S.C. § 523 and 11 U.S.C. § 727 is by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 661, 112 L. Ed. 2d 755 (1991). The preponderance of the evidence standard reflects a fair balance between effectuating the "fresh start" policy of the Bankruptcy Code and limiting the opportunity for a completely unencumbered new beginning to the "honest but unfortunate debtor". Grogan, 111 S. Ct. at 659.

2. Section 727(a)(4) states:

"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."

3. "Debtor may be denied discharge under 11 U.S.C. § 727(a)(4) if he "knowingly and fraudulently, in or in

connection with the case--(A) made a false oath . . ." For a discharge to be denied under this section, it must be shown that there has been an intentional untruth in a matter material to the bankruptcy case. Federal Land Bank of Omaha v. Ellingson (In re Ellingson), 63 B.R. 271, 276 (Bankr. N.D. Iowa 1986). Where assets of substantial value are omitted from the schedules, the court may conclude that they were omitted purposely and with fraudulent intent. Crews v. Topping (In re Topping), 84 B.R. 840, 842 (Bankr. M.D. Fla. 1988). However, the court should not deny a debtor a discharge under this section where matters or property omitted are of a trivial nature or of a low value. American State Bank v. Montgomery (In re Montgomery), 86 B.R. 948, 956 (Bankr. N.D. Ind. 1988); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Simone (In re Simone), 68 B.R. 475, 478-79 (Bankr. W.D. Mo. 1983). The court should also not deny discharge if the untruth is a result of mistake or inadvertence of the debtor. Bologna v. Cutignola (In re Cutignola), 87 B.R. at 706." Molstad v. Joslin, Adv. No. X89-0012S, slip op. at 10 (Bankr. N.D. Iowa April 13, 1990).

4. A debtor who knowingly and fraudulently makes a false oath will be denied discharge under 11 U.S.C. § 727 unless mitigating facts exist to warrant a different result. A false statement made due to mere mistake or inadvertence is not ordinarily sufficient to warrant a denial of discharge. In re Cook, 40 B.R. 903 (Bankr. N.D. Iowa 1984); Linn-Jones Farm Service, Inc. v. Duane Clausen, Adv. No. 83-0471C (Bankr. N.D. Iowa July 5, 1985).

5. Section 523(a)(2)(A) states:

"A discharge under § 727 does not discharge an individual debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by-(A) false pretenses, a false representation, or actual fraud other than a statement respecting the debtor's or an insider's financial condition."

11 U.S.C. § 523(a)(2)(A).

6. Courts use a five part test which must be satisfied before a debt will be excepted from discharge under § 523(a)(2)(A). The elements are: (1) the debtor made false representations; (2) the debtor knew the representations were false at the time they were made; (3) the debtor made the representations with the intention and purpose of deceiving the creditors; (4) the creditor relied on the representations. In re Ophaug, 827 F.2d 340, 343 (8th Cir. 1987); and (5) the creditor sustained the alleged injury as a proximate result of the representations having been made. In re VanHorne, 823 F.2d 1285, 1287 (8th Cir. 1987).

7. The debtor's intent in resolving a complaint under § 523(a)(2)(A) is the most critical element of the analysis. In assessing intent, Courts, including the Northern and Southern Districts of Iowa, have adopted a totality of the circumstances approach based on a number of factors. In re Davis, No. X91-01771F, slip op. at 7 (Bankr. N.D. Iowa Aug. 21, 1991); In re Stewart, 91 B.R. 489, 495 (Bankr. S.D. Iowa 1989); First Bank System, N.A. v. Walderbach, Adv. No. 92-1134LC (Bankr. N.D. Iowa Aug. 31, 1993).

**CLAIM UNDER 11 U.S.C. § 727(a)(4)**

Plaintiff asks the Court to deny a general discharge to the Defendant because she made a false oath in failing to list the child support judgment in her petition schedules. It is uncontested that Defendant failed to list the \$9,000 judgment when she prepared and filed her bankruptcy schedules. As stated, this was a child support judgment which had accumulated in small increments over an extended period of time based upon Mr. Kenny's consistent failure to pay his support obligation. Defendant has had limited success in collecting this child support obligation until recently. It is fair to conclude that historically the value of this judgment would be somewhat less than its face value based on the reticence of Mr. Kenny to fulfill his obligations. Even so, this judgment did constitute property of the estate as defined in 11 U.S.C. § 541 and Defendant was required to list this judgment in her schedules.

The Defendant argues that this was an asset which was exempt and, therefore, the failure to list it was harmless. Plaintiff asserts that the determination whether property of the estate is exempt is for the Court. Plaintiff's position is correct. Deciding whether or not an item of property of the estate is exempt is ultimately a Court function. The debtor is not at liberty to make independent determinations of the exempt status of property and then based upon those determinations, fail to list property in the schedules.

The ultimate issue for determination is whether the debtor knowingly and fraudulently failed to disclose this asset. The Court had an opportunity to examine all of the pleadings and all of the documents, as well as exhibits, which were presented at trial. The Court had an opportunity to listen to, observe, and evaluate the testimony of the witnesses. Based on those observations, it is the conclusion of this Court that the Defendant did not knowingly make a false oath. The Defendant stated that the failure to list this asset was the result of mistake or inadvertence. The Court is satisfied that this is what did occur. While not technically legal defenses, the Defendant's frustration over failure to collect Court ordered child support, its apparent uncollectability, the fact that it

was child support, and the fact that Defendant assumed, though incorrectly, that this was an exempt asset and therefore, unnecessary to list all factors into the Court's decision.

A claim for denial of discharge under 11 U.S.C. § 727 mandates a showing of guilty knowledge as well as fraudulent intent. Based upon the record presented, it is the conclusion of this Court that the Plaintiff has failed to show that the Defendant failed to list this asset either knowingly or fraudulently. Defendant testified that she simply forgot to list this as an asset and the Court accepts that explanation. As such, Plaintiff's claim seeking to deny a general discharge under 11 U.S.C. § 727(a)(4) is denied.

**CLAIM UNDER 11 U.S.C. § 523(a)(2)(A)**

Plaintiff also asserts that Defendant's discharge for indebtedness to Plaintiff for pre-petition attorney's fees should be denied under 11 U.S.C. § 523(a)(2)(A) based upon misrepresentations made to Plaintiff by Defendant. Courts use a five element test to determine whether the underlying claim of § 523(a)(2)(A) has been met. Plaintiff asserts that Defendant made representations which were false and upon which he relied, thereby foregoing legal action and preventing him from getting a judgment earlier and pursuing collection efforts which he may have, otherwise, successfully pursued. The Defendant denies making any representations which were false or misleading to the Plaintiff.

The evidentiary record in this matter establishes that no written contractual agreement existed between Plaintiff and Defendant setting out the parameters of the lawyer-client relationship. Plaintiff stated that an attempt would be made to get the State District Court to allocate a portion of these attorney's fees to Mr. Kenny as a part of the support process. The total amount of fees to be incurred was never clearly established nor was the hourly rate. The Court accepts Defendant's statement that while she always felt she owed Plaintiff for his services, Plaintiff and Defendant never completely had a meeting of the minds as to the amount she would ultimately pay. Throughout the years, various discussions were had as to amounts agreeable to the respective parties, however, no final figure was arrived at which was acceptable to both Plaintiff and Defendant.

The Court has examined the entire record in this regard and has considered the evidence presented. The record is simply devoid of any evidence which would establish that Defendant made false representations to Plaintiff upon which he would be entitled to rely. Defendant made periodic payments and continued to negotiate with the Plaintiff to arrive at an

agreeable final figure. This was unsuccessful. However, continued discussion and continued negotiation does not rise to the level of misrepresentation. There is nothing in this record to indicate that the Defendant's discussions with Plaintiff were other than in good faith. It is the conclusion of this Court that Plaintiff has failed to show, even if these discussions are categorized as representations, that they were made with the intention or purpose of deceiving anyone.

Plaintiff is an attorney and understands this discussion process. There was nothing stated to him in this continuing dialogue upon which he was reasonably entitled to rely. Nothing could be construed as a representation out of which he was injured. This Court determines that Plaintiff has failed to establish by a preponderance of evidence any of the requisite elements necessary to establish a claim justifying denial of discharge under § 523(a)(2)(A).

#### ATTORNEY'S FEES

The final issue for the Court's determination is the award of costs and attorney's fees. Defendant asserts that Plaintiff's claim seeking denial of discharge was not substantially justified and therefore, Defendant is entitled to an award of costs as well as attorney's fees in this case.

The issue of costs and attorney's fees is controlled by 11 U.S.C. § 523(d) which provides:

"If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the Court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the Court finds that the position of the creditor was not substantially justified, except that the Court shall not award such costs and fees if special circumstances would make the award unjust."

The stated purpose for 11 U.S.C. § 523(d) is to discourage creditors for commencing actions in an effort to obtain a judgment from an honest debtor who may not be able to pay for an attorney to handle an adverse proceeding. In re Stewart, 91 B.R. 489, 497 (Bankr. S.D. Iowa 1988). As a general rule, attorney's fees under this section are to be awarded unless the creditor can establish that its claim was "substantially justified". In re Willett, 125 B.R. 607, 609 (Bankr. S.D. Cal. 1991).

While one stated purpose of § 523(d) is to discourage creditors from taking unfair advantage of honest debtors by commencing adversary proceedings which are unjustified in an attempt to obtain unwarranted settlements, at the same time, enforcement of the rule without analysis of the underlying facts serves the function of penalizing creditors from pursuing legitimate claims which are entirely warranted based upon the facts peculiar to each case.

Analysis of the facts in this case establishes, to the Court's satisfaction, that there is little, if any, evidence based upon an objective evaluation of this case to warrant a finding that the claim made by the creditor in this case was substantially justified. The creditor is an attorney familiar with bankruptcy law. A fair evaluation of all of the facts and circumstances surrounding this case establishes little, if any, evidentiary support for either claim. Additionally, during discovery, Plaintiff sought substantial material including records and bank accounts. This required a substantial outlay of time and money by Defendant. Little, if any, of this material was used at trial.

The law is clear that unless the creditor can establish substantial justification for its claim, costs and attorney's fees should be awarded. Reviewing this entire file and having evaluated the evidence, it is the conclusion of this Court that the claim of the creditor was not substantially justified and the debtor is entitled to an award of costs and attorney's fees pursuant to 11 U.S.C. § 523(d). Counsel for the Defendant has submitted evidence as to the total amount of attorney's fees incurred in this case. This was received into evidence as Exhibit 2. Attorney Nathanson billed his fees at \$110 per hour and the total bill incurred because of this representation totals \$1,747.40. It is the finding of this Court, under § 523(d), that Attorney Dolezal will be assessed costs and attorney's fees in the amount of \$1,250 as a result of these proceedings.

**WHEREFORE**, the Court finds that Plaintiff has failed to establish his claim against Defendant brought under 11 U.S.C. § 727(a)(4).

**FURTHER**, the Court finds that Plaintiff has failed to establish his claim against Defendant under 11 U.S.C. § 523(a)(2)(A).

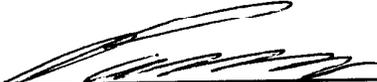
**FURTHER**, the Court finds that Defendant has established that she is entitled to costs and attorney's fees under § 523(d).

**FURTHER**, for the reasons set forth herein, Plaintiff's claim, under both § 727(a)(4) and § 523(a)(2)(A), are DISMISSED.

**FURTHER**, judgment is entered in favor of Defendant and against Plaintiff for costs of this proceeding.

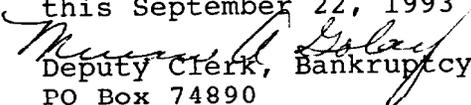
**FURTHER**, Defendant is granted a reasonable attorney's fee in the amount of \$1,250 against Plaintiff under § 523(d).

**SO ORDERED** this 22 day of September, 1993.

  
\_\_\_\_\_  
PAUL J. KILBURG, Judge  
U.S. Bankruptcy Court

Copy (w/Judgment) to:  
Kenneth Dolezal,  
Henry Nathanson  
U.S. Trustee

this September 22, 1993

  
Deputy Clerk, Bankruptcy Court  
PO Box 74890  
Cedar Rapids, IA 52407

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF IOWA

NOV 22 1994

IN RE:

BARBARA A. EVERLY, CLERK

VIRGINIA LORRAINE THOMAS, )  
 )  
 Plaintiff, )

(Bankr. No. L-92-00524C)  
(Adv. No. L-92-0115C)

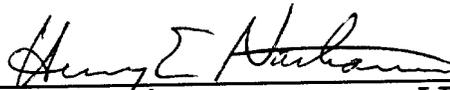
\_\_\_\_\_  
KENNETH F. DOLEZAL, )  
 Plaintiff, )

-vs-

VIRGINIA LORRAINE THOMAS, )  
 Defendant. )

SATISFACTION OF JUDGMENT

For a valuable consideration, receipt of which is hereby acknowledged, Henry E. Nathanson acknowledges payment in full of all sums owed to him for attorney fees in the decision entered on September 22, 1993 in the above case. This is full authority to the Clerk of Court to file this document of record and show the judgment satisfied in full on the docket.



Henry E. Nathanson LI0007212  
Johnston, Potterfield & Nathanson PC  
P.O. Box 74210  
Cedar Rapids, Iowa 52407  
ATTORNEY FOR DEFENDANT

STATE OF IOWA:

:ss

Linn County :

This instrument was acknowledged before me on the 21<sup>st</sup> day of November, 1994 by Henry E. Nathanson, attorney for defendant.



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