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

IN RE:)
) Chapter 7 JONATHAN WILLIAM LEBAHN,)
CARRIE MAE LEBAHN,)
)
Debtors.) Bankruptcy No. 02-03829
---------- UNITED STATES TRUSTEE,)
) Adversary No. 03-9062
Plaintiff,)
)
vs.)
) JONATHAN WILLIAM LEBAHN,)
)
Defendant.)

ORDER RE: COMPLAINT TO REVOKE DEBTOR'S DISCHARGE

The above-captioned matter came on for hearing on January 27, 2004 on U.S. Trustee's complaint to revoke debtor's discharge. Plaintiff U.S. Trustee appeared by Attorney John Schmillen. Debtor Jonathan William LeBahn appeared in person with Attorney John Pieters. After the presentation of evidence, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J).

STATEMENT OF THE CASE

The U.S. Trustee alleges that Debtor's discharge should be revoked under 11 U.S.C. § 727(d)(1) because Debtor provided a false oath or account, concealed property of the bankruptcy estate, and removed property of the bankruptcy estate. Debtor pleads that his actions were based upon innocent misunderstandings and that he did not have the requisite intent to support the U.S. Trustee's allegations.

FINDINGS OF FACT

Debtors Jonathan and Carrie LeBahn filed a joint Chapter 7 petition on October 30, 2002. At the time of filing, Debtor Jonathan LeBahn ("Debtor") had an ownership interest in a figure eight race car built from a late 1970s or early 1980s Chevy ("race car"). Debtor, Tom Adams ("Adams"), and Lurton Bremmet ("Bremmet") had all invested time and/or money into building this race car in the winter of 2001. Bremmet invested mostly time in working on the car, while Adams "sponsored" the car's $3000 motor. Debtor worked on the race car and invested over $100 in parts. A towing company donated the original car to Adams and Debtor, which Debtor estimated had a $50-75 value. The race car never had title documentation. Debtor was the only one who drove the race car, although he testified that the others could have done so as well. The race car was in Debtor's garage when he filed his petition.

Debtor failed to disclose any interest in the race car on the property schedules filed with his Chapter 7 petition. On Schedule B, line 23, Debtor listed three vehicles in his possession: a 1985 Ford Truck, a 1987 Buick Riviera, and a 1991 Lincoln. He did not list the race car which was in his garage. Debtor

testified that he omitted the race car because he did not have complete ownership of it. As there was no title, he did not think he could claim to "own" it. Given what he now knows, Debtor admits that he had some interest in the race car on the petition date.

At the time of filing, the following items were still on the race car: bolts for the trailing arm, ignition switch and starter button, lug nuts, plates for top of rear coil springs, panels on the doors, windshield visor, hood scoop, and number board. Debtor had removed but retained possession of the tires, gauges, seat, and fuel cell. These items had an estimated value of $300-400. Debtor claims it never occurred to him to list these items on his schedules. In the summer of 2003, after his bankruptcy case had been reopened, Debtor turned these items over to Adams for use on another race car.

Under Question 14 of Debtor's Statement of Financial Affairs, he did not claim to hold or control any property owned by Adams or Bremmet. Debtor testified that he "maybe overlooked it a little bit." He also stated that he misunderstood the question because the race car had no title. He claims he did not know their respective ownership interests in the race car.

At the § 341 meeting of creditors on December 16, 2002, Debtor confirmed the accuracy of his schedules under penalty of perjury to Ms. Sheryl Schnittjer, the case trustee. He
never mentioned the race car. Debtor stated that he did not know he had failed to disclose some interest in the race car, thus he had no intent to conceal his interest in the race car from Trustee or his creditors.

Debtor received a discharge and the case was closed on February 20, 2003. Although Debtor claims that the timing was "just coincidence," Debtor contacted Mr. Troy Marshall in an attempt to sell the race car two days after receiving his discharge. Debtor stated that he wanted to keep only the fuel cell, gauges, and racing seat. He did not indicate that any other parts had been removed from the race car since Mr.
Marshall had last seen it in August 2002.

After learning about the race car's existence, the U.S. Trustee filed a motion to reopen the case to administer the sale of the race car. The case was reopened on March 17, 2003. Debtor received notice of this March 14, 2003 motion, which stated that the "modified race car frame and body" was property of the estate.

On March 19, 2003, the case trustee sent Debtor a letter along with the report of sale to Mr. Marshall for $700. The report of sale stated that the "race car including drive shaft and two spare wheels" were sold. The report of sale was also sent to Adams, whom Debtor had indicated had an ownership interest in the race car. Neither Debtor nor Adams objected to the sale.

Trustee's March 19, 2003 letter informed Debtor that "the car and wheels are now property of the bankruptcy estate" and stated that "**all assets will remain in their present condition without any exceptions.**" (emphasis in original). Throughout this period, the race car remained in Debtor's control.

After receiving Trustee's March 14 notice of the motion to reopen, Debtor removed the ignition switch, starter button, shocks, aluminum for the firewall, door panels, visor, hood scoop, and number board. Debtor claims he removed these

items prior to receiving Trustee's March 19, 2003 letter and report of sale to Mr. Marshall. Debtor testified that, based on the March 14 notice, he intended to provide only the race car body and frame.

Debtor contacted his attorney, Mr. Pieters, before removing additional parts from the race car. He asked Mr. Pieters if Mr. Marshall was receiving only those items specified in the March 19 report of sale: race car body and frame, two spare wheels, and a drive shaft. He did not tell Mr. Pieters that he had removed parts from the race car post- petition or that he planned to remove additional parts.

Mr. Marshall initially received the frame, body, street tires with one lug nut on each tire, drive shaft, and two spare wheels. He catalogued the parts that were missing from the race car. The tires, gauges, seat, fuel cell, battery, and engine were missing, although these are the items Debtor originally told Mr. Marshall he was going to remove from the car in the event of a sale. In addition, the following parts were missing: steering wheel, bolts for trailing arms, shocks, lug nuts, U-joint caps, U-bolts for drive shaft, top radiator brackets, fuel line, foot feed pedal and linkage, ignition switch and starter button, plates for top of rear coil springs, roll bar padding, seat bracket, panels for doors and rear seat area, aluminum for fire wall, windshield visor, hood scoop, hood bolts, plates to hold hood down, number board, fan shroud, seat belts, window net, and shifter.

When Mr. Marshall picked up the car from Debtor's residence, there were only two of the four bolts required to hold on the trailing arms. The two bolts that were in place were loose. According to Mr. Marshall, if he had not noticed their absence, the rear end of the race car could have dropped down, causing serious injury. Debtor claims the bolts should have been there, but that there was no safety issue with just the two bolts in place. Mr. Marshall testified that if the bolts had not been in place when Debtor moved the race car from his garage to the street where Mr. Marshall picked it up, the rear end of the car would have fallen off. After cataloguing the missing parts, Mr. Marshall arranged to pick them up from Debtor and received the majority of the parts requested.

Trustee filed this motion to revoke discharge on April 17, 2003.

CONCLUSIONS OF LAW

Trustee seeks revocation of Debtor's discharge under 11 U.S.C. § 727(d)(1). Under 11 U.S.C. § 727(e)(1), Trustee's request must be made within one year of the discharge. Trustee's complaint is timely. Section 727(d)(1) states that:

> (d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if–
>
> (1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge.

11 U.S.C. § 727(d)(1).

In order to revoke Debtor's discharge under § 727(d)(1), Trustee must show (1) Trustee had no knowledge of the fraud until after the discharge; and (2) the

discharge was obtained through fraud. In re Olmstead, 220 B.R. 986, 993-94 (Bankr. D. N.D. 1998); In re Steinke, No. 95-5094XS, slip op. at 7 (Bankr. N.D. Iowa Jan. 29, 1996); In re Cochard, 177 B.R. 639, 643 (Bankr. E.D. Mo. 1995). In a revocation of discharge action, Trustee must prove each element by a preponderance of the evidence. In re Sendecky, 283 B.R. 760, 763 (B.A.P. 8th Cir. 2002) ("The burden of proof is on the objecting party to prove each element of a section 727 Complaint by a preponderance of the evidence."); In re Hanika, No. 99-9037S, slip op. at 3 (Bankr. N.D. Iowa March 31, 2000); Olmstead, 220 B.R. at 993.

Trustee alleges three counts of fraud: (1) Debtor made a false oath in his schedules, statement of financial affairs, and at the § 341 meeting of creditors; (2) Debtor concealed the race car from his creditors and Trustee; and (3) Debtor removed parts from the race car post-petition.

Debtor's discharge was granted on February 20, 2003, but Trustee did not discover Debtor's fraudulent acts until March 14, 2003. If known prior to discharge, each of these allegations alone could have provided grounds to object to discharge. 11 U.S.C. §§ 727(a)(4)(A)and 727(a)(2)(B); see Steinke, No. 95-5094XS, slip op. at 7 ("The Trustee must show that the Steinkes committed actual fraud which would have barred their discharge if the facts had been known and presented in time."); In re Edmonds, 924 F.2d 176, 180 (10th Cir. 1991).

§ 727(a)(4)(A): FALSE OATH OR ACCOUNT

A debtor who "knowingly and fraudulently, in or in connection with the case . . . made a false oath or account" may be denied a discharge. 11 U.S.C. § 727(a)(4)(A). To prove a false oath, Trustee must show by a preponderance of the evidence that (1) Debtor made a statement under oath; (2) that statement was false; (3) Debtor knew the statement was false; (4) Debtor made the statement with fraudulent intent; and (5) the statement related materially to the Debtor's bankruptcy case. 11 U.S.C. § 727(a)(4)(A); Sendecky, 283 B.R. at 763 (preponderance of the evidence is the standard of proof in § 727 complaints); Hanika, No. 99-9037S, slip op. at 3 (setting out the elements of a § 727(a)(4)(A) complaint); In re Baldridge, 256 B.R. 284, 289 (Bankr. E.D. Ark. 2000) (setting out the elements of a § 727(a)(4)(A) complaint).

Debtor signed his petition and submitted his bankruptcy schedules and statements as "true and correct" under penalty of perjury. At the § 341 meeting of creditors, Debtor confirmed under penalty of perjury that his schedules and financial statement were complete and accurate. Debtor's signature and his statements at the meeting of creditors each provide the basis for a claim of false oath. In re Bren, 303 B.R. 610, 613 (B.A.P. 8th Cir. 2004) ("It is clear that a debtor's signatures, under penalty of perjury, on a bankruptcy petition, schedules of assets and liabilities, and the statement of financial affairs are written declarations which have the force and effect of oaths."); In re Mech, No. 97- 9157S, slip op. at 3 (Bankr. N.D. Iowa March 2, 1999). Debtor failed to disclose his interest in the race car in his schedules and at the § 341 meeting of creditors. His schedules and statements were false in this respect.

The Eighth Circuit has held that an omission "concern[ing] the discovery of assets . . . or existence and disposition of the debtor's property" is material." Mertz v. Rott, 955 F.2d 596, 598 (8th Cir. 1992); In re Olson, 916 F.2d 481, 484 (8th Cir. 1990). While the value of an omitted asset may be relevant to determining its materiality, it is not determinative. Olson, 916 F.2d at 484; but see Bren, 303 B.R. at 614 ("[C]ourts are often understanding of a single omission or error resulting from innocent mistake."); Mech, No. 97- 9157S, slip op. at 5 ("Where matters or property omitted are of a trivial nature or of negligible value, however, it becomes more likely that the items could have been omitted by mistake or through inadvertence.").

Debtor's failure to list the race car as an asset affected Trustee's investigation of Debtor's property available for creditors. Although the race car's value to the estate was minimal, "[t]he failure to comply with the requirements of disclosure and veracity necessarily affects the creditors, the application of the Bankruptcy Code, and the public's respect for the bankruptcy system as well as the judicial system as a whole." Tripp, 224 B.R. at 98. The fact that Debtor's creditors were not significantly harmed financially by Debtor's failure to be truthful is not determinative. Id.; see Mertz, 955 F.2d 596 (failing to disclose even exempt assets is a material misrepresentation warranting denial of discharge). In return for the "fresh start" of a discharge, Debtor has a duty to disclose any and all interests he may have. Bren, 303 B.R. at 614; In re Sims, 148 B.R. 553, 555 (Bankr. E.D. Ark. 1992) ("The nondisclosure . . . of assets, without documentation or sufficient explanation, upends the tendency to favor the fresh start.").

To revoke Debtor's discharge, he must have "knowingly and fraudulently" omitted his interest in the race car from his schedules and statements to the case trustee at the meeting of creditors. A fraudulent intent exists for purposes of § 727(a) if an individual knowingly makes a false representation to benefit himself even if the creditors are not financially harmed by his omission. Tripp, 224 B.R. at 98. As a debtor is not likely to admit to fraudulent intent, the debtor's course of conduct and surrounding circumstances may also be considered. In re Gray, 295 B.R. 338, 344 (Bankr. W.D. Mo. 2003) ("Since defendants will rarely admit their fraudulent intent, actual intent may be established by circumstantial evidence."); In re Spears, 291 B.R. 825, 888 (Bankr. C.D. Ill. 2003). If Debtor does not provide a credible explanation for his omission, fraudulent intent may be inferred. Baldridge, 256 B.R. at 291 (rejecting debtor's explanation for failing to list assets on bankruptcy schedules and inferring fraudulent intent); Mech, No. 97-9157S, slip op. at 4.

Debtor claims the race car's omission was accidental, not fraudulent. Debtor testified that, at least with respect to question 14 of his Statement of Financial Affairs, he "maybe overlooked it a bit." Merely glancing over one's bankruptcy schedules or not reading them at all is no excuse for failure to disclose assets. Bren, 303 B.R. at 614-15. Courts have found that a "reckless indifference to the truth" may also establish fraudulent intent. See, e.g., Id. at 616 ("This court . . . has held that reckless indifference to the truth is the equivalent of fraud."); Gray, 295 B.R. at 344; Sims, 148 B.R. at 557 ("[S]tatements made with reckless indifference to their truth are regarded as intentionally false."). Debtor's statement that he "overlooked"

question 14 lends support to a finding that Debtor demonstrated a "cavalier and reckless disregard for truth" in reviewing and signing his schedules and statements under penalty of perjury. Sims, 148 B.R. at 557.

Debtor also claims that he did not understand that his interest in the race car should have been included in his schedule of personal property. This is an insufficient explanation. In Hanika, this Court found that the debtor, a woman with a fourth grade reading ability who stated that the bankruptcy confused her, had made a false oath in failing to disclose assets and revoked her discharge. Hanika, No. 99- 9037S, slip op. at 3; see also Gray, 295 B.R. at 344 (rejecting debtor's claim that she omitted assets from bankruptcy schedules because she did not understand bankruptcy forms). Debtor has a high school education. He never mentioned the race car or his confusion to either his lawyer or Trustee to determine whether he should have disclosed the race car.

While Debtor testified that he did not know precisely what interest he had in the race car, he knew he possessed some interest based on his investment of time and money. He failed to list the race car as his own personal property or as property in his control owned by another. He retained possession and use of the race car. He contacted Mr. Marshall to sell the race car almost immediately after his discharge, although Debtor claimed that the timing was "just coincidence." Debtor and Mr. Marshall had not fixed a price, but testimony established that the race car would sell for between $500-1000. While Debtor's individual creditors received very little monetary value from the distribution of Trustee's $700 sale, Debtor would have benefitted financially from his own sale of the race car.

Although Debtor claimed that at least Adams and possibly Bremmet had significant ownership interests in the race car, neither objected to Trustee's notice of sale of the race car. While Debtor may not have been exactly sure how to define his interest in the race car, "[t]he Code requires nothing less than a full and complete disclosure of any and all apparent interests of any kind. A debtor has an uncompromising duty to disclose whatever ownership interests are held in property." Tripp, 224 B.R. at 98; In re Chambers, 36 B.R. 791, 793 (Bankr. W.D. Ky. 1984) ("If Debtor was uncertain as to the need of inclusion of these accounts, it was incumbent that he disclose the transactions for such legal interpretations as may be warranted."). Debtor had an "unconditional duty to disclose all . . .[his] property interests." Tripp, 224 B.R. at 100; Baldridge, 256 B.R. at 289 (denial of discharge for inaccurate bankruptcy schedules "serves the policy of permitting parties in interest to rely upon the information in the schedules without examination or investigation."); In re Craig, 195 B.R. 443, 451 (Bankr. D. N.D. 1996) (Bankruptcy "requires nothing less of a debtor than a full and complete disclosure of all legal and equitable interests.").

§ 727(a)(2): FRAUDULENT CONCEALMENT OF ASSETS

Under § 727(a)(2), Trustee must prove by a preponderance of the evidence that (1) Debtor concealed the race car; (2) the race car was Debtor's property; (3) Debtor concealed the race car either within one year of filing bankruptcy of at any time post-petition; and (4) Debtor concealed the race car with the intent to hinder, delay, or defraud his creditors or Trustee. 11 U.S.C. §§ 727(a)(2)(A) and 727(a)(2)(B);

Sendecky, 283 B.R. at 763 (section 727 complaint requires proof by a preponderance of the evidence); Tripp, 224 B.R. at 97 (setting out elements of 727(a)(2)(A) complaint).

Debtor's omission of the race car from his schedules and his statements at the meeting of creditors establishes concealment of the race car. In re Lambert, 280 B.R. 463 (Bankr. W.D. Mo. 2002) (finding debtor's failure to list interest in a car on his bankruptcy schedules constituted concealment); Baldridge, 256 B.R. at 291 ("[O]mitting information from the schedules may be construed as a concealment occurring both before and after the filing of the case."). Debtor now admits that he had at least some ownership interest in the race car.

The element at issue is Debtor's intent. Circumstantial evidence may be used to show fraudulent intent. Lambert, 280 B.R. 463 (using circumstantial evidence to show debtor's fraudulent intent in concealing interest in a car); Mech, No. 97-9157S, slip op. at 5. In this case, the evidence of fraudulent intent for concealing the race car is identical to that relied upon to analyze the false oath allegation. See In re Bohnenkamp, No. 00-9068-C, slip op. at 3 (Bankr. N.D. Iowa Sept. 13, 2000) ("Both §§ 727(a)(2)(A) and 727(a)(4)(A) require fraudulent intent to support denial of discharge.").

§ 727(a)(2)(B): FRAUDULENT REMOVAL OF ASSETS

Under 11 U.S.C. § 727(a)(2)(B), discharge may be denied if Trustee proves by a preponderance of the evidence that Debtor removed property of the estate after filing his petition with the intent to hinder, delay, or defraud Trustee or a creditor. 11 U.S.C. § 727(a)(2)(B); Sendecky, 283 B.R. at 763 (elements of a section 727 complaint must be proven by a preponderance of the evidence). As with allegations of false oaths and concealment of assets, Debtor's fraudulent intent may be inferred from his course of conduct and from circumstantial evidence. See, e.g., Lambert, 280 B.R. 463; Mech, No. 97-9157S, slip op. at 5.

Debtor removed several items from the race car after filing his bankruptcy petition. He removed the ignition switch and starter button, shocks, aluminum for the firewall, door panels, visor, hood scoop, and number board after receiving Trustee's March 14, 2003 notice of the motion to reopen Debtor's bankruptcy case. That notice stated that the "modified race car frame and body" were property of the estate. Debtor also received Trustee's March 19, 2003 report of sale and letter. The report of sale specified that the "race car including drive shaft and two spare wheels" were being sold to Mr. Marshall. The letter informed Debtor that **"all assets will remain in their present condition without any exceptions."** After receiving Trustee's March 19 communications, Debtor admits to removing additional items from the race car without permission.

Debtor claims that he misunderstood Trustee's letters. He thought the sale to Mr. Marshall did not include any of the items removed from the race car. Debtor contacted his attorney, Mr. Pieters, to confirm that Mr. Marshall would receive only the race car, drive shaft, and two spare wheels, but Debtor did not ask whether he could remove any parts. As Debtor did not inform Mr. Pieters that he had removed parts from the race car post-petition or that he was planning to remove additional parts after his case was reopened, Debtor may not rely upon Mr. Pieter's statement as an excuse for his actions. See In re Bateman, 646 F.2d 1220, 1224 (8th Cir.

1981) (acts of fraudulent intent are excusable due to mistaken, reasonable reliance on attorney's advice only if all relevant facts were disclosed to the attorney).

In light of Debtor's concealment of the race car from the beginning of his bankruptcy combined with his course of conduct once his bankruptcy case was reopened, Debtor's explanation is not credible. See Baldridge, 256 B.R. at 292 ("The Court does not believe the minimal explanations of neglect, lack of knowledge and mere inadvertence."). The language of Trustee's letters clearly indicates that the race car was property of the estate and should not be altered.

CONCLUSION

Trustee has proved by a preponderance of the evidence that Debtor, with fraudulent intent, made false oaths, concealed assets, and removed property of the estate post- petition. While revocation of discharge is a serious remedy, only "deserving debtors receive a 'fresh start.'" Bren, 303 B.R. at 614. The benefit of a "fresh start is reserved only for the 'honest but unfortunate debtor.'" Tripp, 224 B.R. at 100. "The bankruptcy system relies upon the truthfulness of those who seek its benefits." Bren, 303 B.R. at 616. Debtor's actions considered together demonstrate fraudulent intent from the filing of his bankruptcy petition through Trustee's sale of the race car. See Gray, 295 B.R. at 344 ("A series or pattern of errors or omissions may have a cumulative effect giving rise to an inference of an intent to deceive."). While the value of the race car to the estate is minimal, Debtor's actions on the whole warrant this serious remedy. As the Eighth Circuit Bankruptcy Appellate Panel noted, "'Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight.'" Bren, 303 B.R. at 614. Debtor's discharge is revoked.

WHEREFORE, Trustee's Complaint to Revoke Debtor Jonathan LeBahn's Discharge is GRANTED.

FURTHER, Debtor Jonathan LeBahn's discharge is denied under both §§ 727(a)(4)(A) and 727(a)(2).

SO ORDERED this 2nd day of March, 2004.

_____ PAUL J. KILBURG
Chief Bankruptcy Judge