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

IN RE:)
) Chapter 7
RONNIE E. BREWER)
MARCIE M. BREWER)
)
Debtors.) Bankruptcy No. 02-02520
---------- UNITED STATES TRUSTEE,)
) Adversary No. 03-9204
Plaintiff,)
)
vs.)
)
RONNIE E. BREWER,)
)
Defendant.)

ORDER RE: COMPLAINT TO REVOKE DEBTOR'S DISCHARGE

The above-captioned matter came on for hearing on April 28, 2004 on U.S. Trustee's complaint to revoke Debtor Ronnie Brewer's discharge. Plaintiff U.S. Trustee appeared by Attorney John Schmillen. Debtor Ronnie Brewer appeared on his own behalf. After the presentation of evidence, the Court took the matter under advisement. The time for filing briefs has passed. This is a core proceeding pursuant to 28 U.S.C.
§ 157(b)(2)(J).

STATEMENT OF THE CASE

Plaintiff U.S. Trustee ("U.S. Trustee") alleges that Debtor Ronnie Brewer's discharge should be revoked under 11
U.S.C. § 727(d)(1). U.S. Trustee contends that Debtor Ronnie Brewer ("Debtor") made a false oath or account when he verified the accuracy of his bankruptcy schedules. Debtor argues that he did not have the requisite fraudulent intent to warrant revocation of his discharge.

FINDINGS OF FACT

Debtor has filed two prior bankruptcy cases with this Court. On October 18, 1993, Debtor filed a Chapter 7 petition
(No. 93-11712). He received a discharge on January 25, 1994. Thereafter, Debtor married Amy Jo Norris ("Creditor"), now known as Amy Jo Nguyen. They separated about the time that Creditor joined the United States Air Force. On October 7, 1996, they finalized their divorce. Pursuant to the divorce decree, Creditor was responsible for $2,728 of their joint debts, while Debtor was responsible for approximately $16,500 of their joint debts.

Debtor filed for Chapter 7 relief a second time on February 2, 1998 (No. 98-00283). At the time of filing, there was a pending state court contempt proceeding in Polk County District Court initiated by Creditor due to Debtor's failure to pay his share of the marital debts pursuant to the divorce decree. In

his 1998 bankruptcy schedules, Debtor listed a debt to Creditor at the following address:

Amy Jo Brewer-Norris c/o Paul & Judy Norris 6918 Northview Drive Urbandale, IA 50322	1990-97 Account	$15,000

In this Court's view, there is some confusion as to the nature of the debt in question. The debt listed in the 1998 schedules, as well as in the present case, apparently does not represent the unpaid marital debts. It is some type of unspecified personal debt that accumulated both before and during the parties' marriage. While both parties acknowledge the existence of a debt, no documentation has been provided and it was not included in the divorce decree.

Creditor received notice of the 1998 bankruptcy and actively participated in the proceedings. Due to the § 727(a)(8) bar to a Chapter 7 discharge, Debtor converted that case to Chapter 13 on March 17, 1998. The Chapter 13 case was ultimately dismissed on July 14, 1998.

Debtor Ronnie Brewer has subsequently remarried. He and his present spouse, Marcie Brewer, filed a joint Chapter 7 petition on July 23, 2002. Creditor's parents, Paul and Judy Norris, are listed in the bankruptcy schedules as contacts for their daughter. Their address was provided as follows:

Paul and Judy Norris Des Moines, IA

On July 26, 2002, notice of the Chapter 7 bankruptcy was sent via first class mail to Paul and Judy Norris at the provided address. It was returned as undeliverable. Paul and Judy Norris resided at the following address from January 1997 until January 2004:

Paul and Judy Norris 6918 Northview Drive
Urbandale, IA 50322

In explanation for his use of Des Moines instead of Urbandale, Debtor testified that he thinks of Urbandale as a part of or a suburb of Des Moines.

At the time of the 2002 filing, Debtor and Creditor were involved in state court contempt proceedings in Polk County District Court (No. CD 51313) related again to Debtor's alleged failure to pay debts assigned in the divorce decree. Janet Hong, Debtor's attorney during the 2002 bankruptcy prior to its reopening, provided the Court with an affidavit. It states that Debtor did not have the exact contact information for Creditor with him on the petition date. Due to an impending state court contempt hearing scheduled for July 25, 2002, Debtor filed his bankruptcy petition and schedules on July 23, 2002 without this information. While Ms. Hong told Debtor that a complete address should be obtained in the future, she also advised Debtor that "due to the stay of the contempt proceeding, his ex-spouse would inevitably receive word through the State Court that the bankruptcy had been filed."

Ms. Hong notified Randy Jackson, Debtor's attorney for the state court contempt proceeding, of the bankruptcy proceeding. She faxed Mr. Jackson a copy of Debtor's bankruptcy petition and schedule of creditors. According to Mr.

Jackson's affidavit, he proceeded to file a "Motion to Stay Contempt Proceedings/Notice of Chapter 7 Bankruptcy Filing" in Polk County District Court on July 24, 2002. On that same day, a copy of his Motion, to which the official Notice of Bankruptcy was attached, was mailed to Creditor in care of her parents at the address on file with the Polk County Court. This is the address at 6918 Northview Drive, Urbandale, Iowa 50322. Creditor denies receiving Mr. Jackson's Motion or the attached official Notice of Bankruptcy.

On July 25, 2002, the state court entered an order staying further contempt proceedings in light of Debtor's bankruptcy proceeding. According to Judge Glenn E. Pille's order, on July 25, 2002 a copy was mailed to:

Amy Norris
6918 Northview Drive
Urbandale, IA 50322

Creditor acknowledges that she received Judge Pille's order staying the contempt proceeding. She testified that she attempted to locate information about Debtor's 2002 bankruptcy through the Polk County courts as well as through this Court, but that there was no record of Debtor's 2002 bankruptcy proceeding. Creditor then notified the state court that there was no bankruptcy case on file after 1998. She testified that the warrant for Debtor was thereafter reinstated.

Debtor listed Creditor as an unsecured creditor for an undetermined amount on his amended 2002 bankruptcy schedules. Her address on the amended schedules, submitted seven days after the bankruptcy filing, was provided as follows:

Amy Jo Norris
1130 Foreststalll [sic] Ln. Brownsville, TX 78520

Debtor testified that Creditor gave him the Texas address by phone. Creditor testified that she has never resided in Texas and never gave Debtor a Texas address.

As an extension of the foregoing testimony, Debtor testified that Creditor has often provided him, as well as others, with false or non-existent addresses. To support this proposition, he called Robert Chiafos as a witness. In 1996, Mr. Chiafos was with the Air Force Office of Special Investigations. He testified that in 1996 he investigated Ms. Nguyen for allegedly fraudulently claiming dependents at fictitious addresses. Mr. Chiafos testified that although he has not seen the overall investigative conclusions in Creditor's case, it "appeared on its face" that Creditor had filed a document containing a false address with the Air Force. Creditor denies any wrongdoing in connection with this incident.

On October 24, 2002, notice of Debtor's discharge was mailed to Creditor at the address provided in Debtor's amended bankruptcy schedule. It was returned as undeliverable.
According to U.S. Postal Service records, the address does not exist. Creditor testified that she has resided at the following address since roughly 2000:

Amy Nguyen
703 Locust St.
Great Falls, Montana 59405

On October 24, 2002, the Court entered a discharge order and closed Debtor's bankruptcy case as a no-asset filing. On October 25, 2002, Debtor mailed copies of his wedding photographs to Creditor at:

Amy Nguyen
703 Locust St.
Great Falls, Montana 59405

On October 28, 2002, Debtor sent Creditor a letter to the same address. Creditor testified that it was at this point that she first discovered Debtor's 2002 bankruptcy. Debtor testified that he received the Montana address from his brother, who had received it from a creditor attempting to collect a debt from Creditor. Debtor stated that he did not know if the Montana address was a false address, but that he was "taking a chance" that his letters would reach Creditor. He testified that sending the letters was a mistake, but that their timing was merely coincidental.

U.S. Trustee filed a motion to reopen the bankruptcy case on June 27, 2003. The Court entered orders reopening the case on June 27, 2003 and July 29, 2003.

CONCLUSIONS OF LAW

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

> (d) On request of 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), U.S. Trustee must show (1) U.S. 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 a revocation of discharge action, U.S. 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); Olmstead, 220 B.R. at 993. While a discharge is a privilege, "the Code's revocation provision is construed strictly against the party requesting the revocation of a debtor's discharge and liberally in favor of its retention by the debtor." Olmstead, 220 B.R. at 993.

U.S. Trustee alleges that Debtor failed to make a good faith effort to provide Creditor with notice of the bankruptcy case. In affirming the accuracy of his bankruptcy schedules, which contained inaccurate contact information for Creditor, U.S. Trustee asserts that Debtor made a false oath.

Debtor's discharge was granted on October 24, 2002, but U.S. Trustee did not discover Debtor's allegedly fraudulent acts until information from Creditor was submitted to U.S. Trustee on June 27, 2003. If known prior to discharge, U.S. Trustee's allegation could have provided grounds for an objection to discharge. 11 U.S.C. § 727(a)(4)(A).

§ 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, U.S. 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 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); 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 as "true and correct" under penalty of perjury. Debtor's signature may provide the basis for a claim of false oath. In re Bren, 303 B.R. 610, 613 (B.A.P. 8th Cir. 2004). There is no dispute that Creditor's address and contact information listed on Debtor's bankruptcy schedules were inaccurate. Whether Debtor presented this information with fraudulent intent must be gleaned from the evidence.

Debtor's inaccurate listing of Creditor's address must be material to warrant revocation of discharge. The Eighth Circuit has held that a false oath is material if the subject matter "bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property." Mertz v. Rott, 955 F.2d 596, 598 (8th Cir. 1992); In re Olson, 916 F.2d 481, 484 (8th Cir. 1990). The materiality of a false oath does not depend on a detrimental effect on creditors. In re Mazzola, 4 B.R. 179, 183 (Bankr. D. Mass. 1980) (citing In re Slocum, 22 F.2d 282, 285 (2d Cir. 1927)).

Courts have found that a debtor's intentional provision of an inadequate address to keep the bankruptcy secret and prevent a creditor from opposing discharge may constitute a material false oath. See, e.g., In re Zahralddin, 1 B.R. 621 (Bankr. E.D. Va. 1979); In re D'Alessio, 24 F.Supp. 563, 564 (D. S.D.N.Y. 1938); Lunday v. Skinner, 263 N.W. 520 (Iowa 1935).

The element at issue is Debtor's intent. In order to revoke Debtor's discharge, he must have "knowingly and fraudulently" omitted Creditor's correct contact information from his bankruptcy schedules. In re Seablom, 45 B.R. 445, 449 (Bankr. D.N.D. 1984) ("It is not the purpose of section 727 to deny a discharge to a debtor merely because information is missing or inaccurate. The information must have been omitted or altered with the specific purpose of

working a fraud."). 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.

7

338, 344 (Bankr. W.D. Mo. 2003). If Debtor does not provide a credible explanation for his omission, fraudulent intent may be inferred. Baldridge, 256 B.R. at 291.

Debtor argues that he reasonably believed that notice of his bankruptcy case would reach Creditor. Ms. Hong's affidavit confirms that the addresses in Debtor's bankruptcy schedules were initially incomplete due to the time constraints of the filing. Creditor's contempt action against Debtor was scheduled for July 25, 2002, two days after the bankruptcy filing. Ms. Hong told Debtor that he should provide a complete address for Creditor or her parents, but also specifically informed him that "due to the stay of the contempt proceeding, his ex-spouse would inevitably receive word through the State Court that the bankruptcy had been filed." (Emphasis added).

Debtor knew that Mr. Jackson's July 24, 2002 Motion to Stay Contempt Proceedings/Notice of Chapter 7 Bankruptcy Filing was copied to Creditor at the address on file with the Polk County District Court. A copy of the official Notice of Bankruptcy was attached to that Motion. Judge Glenn E. Pille's July 25, 2002 order staying the contempt proceedings was also copied to Creditor at her parents' address. Both notices were mailed well before the October 24, 2002 discharge date. Creditor admitted to receiving at least one of these notices.

CONCLUSION

There is authority in this Circuit which holds that evidence may be "so internally inconsistent or facially implausible that a reasonable fact finder would not credit it." In re Lamayer, 898 F.2d 1346, 1350 (8th Cir. 1990). Unfortunately, elements of the evidentiary record from both sides falls within this admonition. From this somewhat flawed record, the Court must draw what conclusions it can, applying the legal principles that the burden of proof is upon Plaintiff and that revocation provisions are strictly construed against the party seeking revocation. A careful examination of the record presented convinces this Court that sufficient valid conclusions can be drawn to resolve this case.

Plaintiff, primarily through the testimony of Creditor, argues that Debtor intentionally kept knowledge of his pending

8

bankruptcy from her. She argues that he did so by sending mailings to incorrect or non-existent addresses. Admittedly, the record contains evidence which might, at first glance, give a reasonable person cause to suspect that this was Debtor's intention. However, an examination of the credible evidence in this case convinces the Court that, within days of the filing of the bankruptcy petition, Creditor knew or should have known that Debtor had filed a bankruptcy petition.

Debtor filed the Chapter 7 petition on July 23, 2002. His attorney filed the petition with less than complete information because Debtor had an impending State Court hearing scheduled for July 25, 2002, which Debtor sought to stay by this bankruptcy filing. In order to stay the

proceedings, Debtor's bankruptcy counsel in Cedar Rapids faxed to Debtor's State Court counsel in Des Moines a copy of the bankruptcy petition and schedule of creditors. Debtor's Des Moines counsel then proceeded to file a Motion to Stay Proceedings with a copy of the official notice of bankruptcy attached. Debtor's counsel filed a copy of this Motion with the Polk County District Court Clerk's Office and also mailed a copy of it to Creditor Nguyen at 6918 Northview Drive, Urbandale, Iowa, which has been a repository for Creditor's mail.

It has long been settled that the law presumes that correspondence properly addressed, stamped, and mailed was received by the individual or entity to whom it was addressed. Arkansas Motor Coaches v. Commissioner, 198 F.2d 189, 191 (8th Cir. 1952); Iowa Lamb Corp. V. Kalene Ind., 871 F. Supp. 1149, 1153 (N.D. Iowa 1994). The Federal Rules of Bankruptcy Procedure are consistent with the Common Law Doctrine which recognizes a rebuttable presumption that an item properly mailed is received by the addressee. This presumption is strong and not easily rebutted. In re Borchert, 143 B.R. 197, 920 (Bankr. D.N.D. 1992). A letter properly addressed and mailed is presumed to have been delivered to the addressee.
In re Hairopoulous, 118 F.3d 1240, 1244 (8th Cir. 1997); Montgomery Ward, Inc. V. Davis, 398 N.W.2d 869, 870 (Iowa 1987).

Creditor has denied receiving the motion to stay the State proceedings with the bankruptcy petition attached. However, this Court concludes that Creditor has not rebutted the presumption that this mailing was received at her address. Additionally, on July 25, 2002, the Polk County District Court entered an Order staying proceedings based upon Debtor's bankruptcy proceeding. This Order was sent to Creditor at the above Urbandale, Iowa address. She acknowledges that she did receive a copy of this order.

Creditor testified that she attempted to locate information about Debtor's bankruptcy through the Polk County Courts as well as through this Court. She states there was no record of Debtor's 2002 bankruptcy proceeding. She further testified that she then notified the State court that there was no bankruptcy case on file after which the State court reimposed the warrant for Debtor's arrest.

An examination of the record convinces this Court that there is insufficient evidence to rebut the presumption that the Motion to Stay Proceedings was mailed and delivered to Creditor in due course. Attached to that Motion was a cover sheet of the bankruptcy petition which would clearly and unambiguously notify Creditor of the pendency of the bankruptcy proceedings in Cedar Rapids, Iowa. Additionally, there is no dispute, and Creditor actually acknowledges, that she did receive a copy of the Stay Order from Polk County District Court. This Order made the finding that Debtor had filed a bankruptcy petition.

While Creditor asserts that she made reasonable efforts to find where the bankruptcy petition was filed, it is the conclusion of this Court that Creditor had sufficient information to make that determination. Even if she did not, a copy of the cover sheet of the bankruptcy petition was attached to the original motion filed by Debtor's attorney in the Polk County action. Simple inquiry or examination of that file would have revealed the whereabouts of the proceeding. This Court must conclude that, if Creditor did in fact make attempts to discern the location of the pendency of Debtor's bankruptcy petition, these attempts were inadequate to satisfy the legal requirement that she make reasonable attempts to

satisfy herself of the pendency and location of this bankruptcy petition. This Court must conclude that Creditor knew or should have known of the pendency of Debtor's bankruptcy petition no later than two days after its filing. Creditor had adequate time within which to intervene in this bankruptcy proceeding to protect any interests which she might have in Debtor's estate. Her failure to do so was not caused by any acts of Debtor.

The foregoing must be given a proper legal context by recalling that the burden of proof is upon Plaintiff to establish the requisite elements for revocation of discharge. It is the conclusion of this Court that Plaintiff has failed to establish by a preponderance of evidence that Creditor was denied any rights as a Creditor in Debtor's bankruptcy proceeding because of acts by Debtor.

WHEREFORE, U.S. Trustee's complaint to revoke Debtor Ronnie E. Brewer's discharge is DENIED.

SO ORDERED this **_18_th__** day of May, 2004.

_____ PAUL J. KILBURG
Chief Bankruptcy Judge