

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

GARLAND ATTRILL
Debtor.

Bankruptcy No. X88-01008S
Chapter 7

DONALD H, MOLSTAD, Trustee
Plaintiff

Aversary No. X88-0210S

vs.

GARLAND ATTRILL
Defendant.

MEMORANDUM OF DECISION AND ORDER RE: TRUSTEE'S OBJECTION TO DISCHARGE

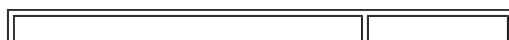
Trustee objects to the discharge of Garland Attrill based on grounds within 11 U.S.C. 727(a)(2) and its subsections and 727(a)(4)(A). Trial was held on March 30, 1989 in Sioux City, Iowa.

The court now issues the following memorandum of decision and order which includes findings of fact and conclusions of law pursuant to Bankr. R. 7052.

This is a core proceeding under 28 U.S.C. 157(b)(2)(J).

FINDINGS OF FACT

1. Garland Attrill filed his chapter 7 bankruptcy case on June 29, 1988. Donald H. Molstad was appointed trustee.
2. Attrill is 37 years old and a high school graduate. He is employed by Enviro Safe Air as a supervisor. Enviro is in the business of asbestos abatement. Attrill has been employed by Enviro since October 31, 1988. Prior to that, he worked for Rochester Products in Sioux City for three and one-half to four years.
3. Attrill was divorced from Susan Attrill, his wife of 15 years, in June, 1987. A judgment and decree dissolving the marriage and dividing property was entered in the Iowa District Court for Woodbury County on June 29, 1987.
4. By the decree, Attrill was awarded the following items of personal property which were valued by the district court as shown:



Property	Value
1985 GMAC truck	\$ 9,000.00
1972 Triumph TR6	1,600.00
Snow blade	300.00
Snowmobile	200.00
Jewelry	200.00
Hawkeye G. Inv.	200.00
Telco Tr. Cr. Union	280.00
IRS F.F.S. & L.	722.22
Sioux Valley	83.22
Telco Triad Credit	11.63
Elro Boat Motor & trailer	7,500.00
Personal savings from GM	1,600.00

5. Also by the decree, Attrill was awarded certain household goods, sports equipment and tools. These 25 items or groups of items were set out in paragraph 26 on page 11 of the decree.

6. The divorce proceeding was nasty and contentious. As a result, Attrill says he was depressed and confused. As part of the fallout from the divorce proceeding, Attrill's former spouse has made it difficult for him to see his children and he says he has not seen them since August of 1987. Further, Mrs. Attrill has obtained multiple garnishments of Attrill's wages since the initiation of the divorce proceeding. Attrill has had to pay his living expenses on as little as \$97.00 per week during periods since the divorce.

7. Much of the personal property and household goods awarded to Attrill by the decree were tossed into a barn on the family property and as a result of their treatment, were so damaged that at the time of the bankruptcy they were valueless. As a result of his wife's treatment of his personal property, Attrill, at the time of the filing of the bankruptcy case, believed he had a claim against her. He had tried to obtain relief on this claim as part of the dissolution proceeding but was unsuccessful. Despite the lack of success, he still believed he had a claim against her but had no money to pursue it.

8. Needing money during the divorce proceeding, Attrill borrowed money from Telco Triad Credit Union and gave as collateral his interest in the 1972 Triumph TR6. After the divorce decree, Attrill sold his interest in the Triumph to his live-in companion, Patricia Levich. He received no cash, but she agreed to pay off Attrill's Telco loan. He believes that at the time of the sale he executed some papers at Telco, but was unable to describe them in his testimony. Attrill believed that Levich paid off the loan to Telco and obtained title to the vehicle but he does not know when that took place. He thinks that it took place prior to his filing bankruptcy and therefore it was in error for him to list the ownership of the vehicle on his schedule B-2-f. He did, however, list the transfer of his interest in the motor vehicle to Levich on a statement of affairs. (Response to question 12b.)

9. As a result of the divorce proceeding, Attrill was responsible not only for sizeable attorneys' fees of his own but for a portion of his former wife's. He also remained responsible for other debts.

10. Because of his mounting debts, shortly after the divorce decree entered, Attrill began liquidating various assets. These included a Prudential life insurance policy having a cash value of \$1,200.00, a

partial interest in a group investment arrangement entitled "Hawkeye G. Inv.," an IRA account at First Federal Savings & Loan and personal savings with General Motors.

11. At the time of the filing of the bankruptcy case, Attrill had an interest in a pension plan at Terra International, Inc. Attrill was awarded the plan by the dissolution decree, but no value was "placed upon it. Terra contributed in excess of \$3,000.00 to the plan while Attrill was employed there. Attrill testified that under the plan he would receive \$25.00 per month beginning at the age of 65. At the time of the filing of the case, he considered it valueless.

12. At the time of the filing of his bankruptcy case, Attrill failed to list certain transactions and assets in his statement and schedules respectively. The parties stipulated at the outset of trial that he failed to list his ownership in the following Property:

- Snow blade
- Snowmobile
- Jewelry
- Savings with GMAC pension plan
- Savings with Terra Chemicals pension plan
- Bank account at First Federal Savings & Loan with balance of \$465.62
- Bank account with Telco Triad Credit Union with balance of \$115.90
- Timex watch

13. It was also stipulated by the parties at trial that the debtor's original schedules or statement of affairs failed to indicate the following transactions:

- Closing within one year of filing bankruptcy on IRA account with a balance of approximately \$750;
- Liquidation of a life insurance policy in the amount of \$1,200;
- The sale of a boat.

14. On July 12, 1988, Attrill filed an amendment to his schedules showing the transfer in April, 1988 of a 1978 inboard/ outboard Ebko boat and trailer. He listed the boat as having a value of \$6,750 and stated that of the money received, he paid \$3,200 to the secured creditor, Telco Triad Credit Union. He used the balance of the sales price for living expenses.

15. The trustee took the examination of the debtor under Bankr. R. 2004 in August of 1988. Following the 2004 examination, debtor filed a second amendment to his schedules identifying many of the omitted assets and transactions. This was executed by Attrill on September 1, 1988.

16. At the time of the filing of the bankruptcy case, Attrill believed that the balance in the savings account at First Federal Savings & Loan was \$9.00. This was incorrect. The balance was \$465.62. Attrill testified that he truly believed the account balance was only \$9.00 at the time of filing because (1) he did not balance his account and (2) his ex-wife was regularly garnishing his accounts. At Telco Triad Credit Union on the date of bankruptcy, there was \$115.90.

Attrill testified that he had not disclosed either account or its balance because of oversight. He said he did not remember them nor did he think of them.

Attrill testified that he understood that it was his responsibility in filling out his schedules to tell the truth. He also testified that because of the divorce, he was depressed, confused and wanted his attorney to handle all matters.

17. Sometime after the filing of the bankruptcy, Attrill realized there was more money in the account than \$9.00. After the bankruptcy was filed, he deposited no money in the account and it does not appear from the bank ledger (plaintiff's exhibit 5) that the account earned interest. However much Attrill learned was in the account, he did write two checks from the account in the summer of 1988. The first was written on July 29, 1988 for \$74.50. The second was written on August 9, 1988 for \$350.00. The money was used each time for debtor's living expenses.

18. When Attrill realized the money in the account was in excess of what he originally believed, he did not contact the trustee with the information nor did he contact his attorney. It was not until the trustee learned of the funds from other sources and made demand upon Attrill, that the withdrawn money was paid to the trustee.

19. Attrill testified at trial that the reason he omitted assets and transactions from his schedules and statement of affairs was inadvertence and oversight and a lack of understanding of some of the questions in the statement of affairs. He testified further that he had no intent to conceal or deceive.

20. Attrill did not list his Timex watch as jewelry on his schedules because he did not think of it as such. As to the snow blade, he did not separately list it from his pickup truck because he considered it part of the truck. He does not take it off, and it is welded to the front of the vehicle.

21. As to the snowmobile, he did not consider it worth anything and therefore did not list it. He said he purchased it ten years ago for \$100. It was part of the property thrown into the barn. It had sand in the gas tank, a smashed windshield and torn-up seats. With regard to the snowmobile and other personal property in the barn, Attrill testified that since he thought property was not worth anything, it did not have to be listed. He agrees that he made the decision as to worth.

DISCUSSION

Trustee objects to Attrill's discharge on the grounds that he concealed his assets and filed false schedules and statement of affairs.

Trustee argues that the evidence is that Attrill concealed assets by failing to list the following:

- a. First Federal Savings & Loan account in the amount of \$465.62;
- b. Telco Triad Credit Union account balance in the amount of \$115.90;
- c. Snow blade;
- d. Snowmobile;
- e. Jewelry;
- f. Terra Chemical International pension plan;
- g. Personal property located in the barn or a claim against his ex-wife for the destruction of that property.

Trustee also states that Attrill signed a false statement of affairs and concealed the following transactions which took place within one year of the filing of the bankruptcy case:

- a. The closing of the IRA account with a balance of \$750;

- b. The liquidation of Attrill's life insurance policy in the amount of \$1,200;
- c. The liquidation of a savings plan with GMAC;
- d. Sale of the motor boat.

The trustee also objects in some way to the disclosure by Attrill of the ownership in the Triumph automobile or in the manner in which it was transferred to Ms. Levich.

Because of the aforementioned omissions and actions of the debtor, trustee objects to his discharge under 11 U.S.C. 727(a)(2) and 727(a)(4).

Section 727(a)(2) prevents a discharge of a debtor if

"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;"

Actual fraudulent intent must be shown. First Beverly Bank v. Adeeb; Consumers Oil Co., et al. v. Adeeb, 787 F.2d 1339, 1242-43 (9th Cir. 1986).

Section 727(a)(4)(A) prevents the debtor from obtaining a discharge if he "knowingly and fraudulently, in or in connection with the case--made a false oath. . . ."

To prevent discharge under 727(a)(4), plaintiff must show that there has been an intentional untruth under oath in a matter material to the bankruptcy. 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 with fraudulent intent. Crews v. Topping (In re Topping), 84 B.R. 840, 842 (Bankr. M.D. Fla. 1988).

Discharge should not be denied under 727(a)(4) where matters or property omitted are trivial in nature or of 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, 478-479 (Bankr. W.D. Mo. 1983). Discharge should also not be denied where the untruth is the result of the debtor's mistake or inadvertence. Bologna v. Cutignola (In re Cutignola), 87 B.R. 702, 706 (Bankr. M.D. Fla. 1988).

In order to prevent discharge under either Code section, the trustee must prove the allegations against the debtor by clear and convincing evidence. Hampton State Bank v. Elling (In re Elling), Adv. No. X86-0363M, slip op. at 26 (Bankr. N.D. Iowa, April 21, 1989).

The court, having considered the evidence and the testimony of the defendant, finds that the omissions from the schedules as to assets and transfers were not with fraudulent intent.

Those assets held at the time of bankruptcy which were not listed on the schedules were of negligible value or the omission was adequately explained by the debtor. The court also believes that the

omission of certain transfers within a year prior to bankruptcy were inadvertent. The debtor had not transferred these assets as gifts or for unequal value.

Debtor should have taken more care in listing the omitted assets and transfers but the court cannot conclude that their omission was fraudulent.

Debtor's counsel is correct in stating in closing argument that the difficult aspect of this case is the debtor's use of cash deposits which were property of the estate.

It is this post-petition use of property of the estate which is not adequately explained by the debtor.

At the time he filed bankruptcy, Attrill believed he had \$9.00 in a checking account at First Federal Savings & Loan in Sioux City. The balance actually was \$465.62. The court accepts debtor's testimony and believes that at the time of filing, he believed he had only \$9.00 on deposit. After the bankruptcy was filed, however, the debtor learned there were more funds in the account. Without making any further deposits to the checking account, Attrill wrote two checks on the account, one in late July and the other in early August. These checks from the account totaled \$424.50.

From the evidence, the court concludes that Attrill discovered the money was in the account, knew it was property of the estate, did not inform the trustee of its existence, and used it for his personal expenses with intent to hinder, delay or defraud creditors or the trustee. Debtor's counsel argues that this should be forgiven because the debtor has paid the trustee the amounts taken. This was not done, however, until after the trustee had discovered the existence of the money and its use and had demanded its return.

The return of the money in this case does not present the same type of circumstances which warranted the entry of discharge in First Beverly Bank v. Adeeb; Consumers Oil Co., et al. v. Adeeb (In re Adeeb), 787 F.2d 1339 (9th Cir. 1986).

This court also cannot accept the argument that the matter was trivial in amount.

Debtor explains some of his actions by describing his confused and depressed state arising out of his dissolution proceeding. This is not an acceptable explanation. Debtors decree and dissolution was entered in June of 1987. Bankruptcy was filed in June of 1988 and the money was wrongfully transferred in July and August of 1988. Depression over divorce does not permit the wrongful transfer of estate property nor will it permit a conclusion that the money was taken inadvertently or without wrongful intent. Debtor's financial difficulty does excuse debtor's actions.

CONCLUSIONS OF LAW

Debtor should be denied discharge under 11 U.S.C. 727(a)(2)(A) for transferring property of the estate with intent to hinder, delay or defraud creditors or the case trustee.

ORDER

Judgment shall enter denying debtor a discharge.

SO ORDERED ON THIS 24th DAY OF APRIL, 1989.

William L. Edmonds

Bankruptcy Judge