

In the United States Bankruptcy Court

for the Northern District of Iowa

TERRY L. GEARHART

Debtor(s).

Bankruptcy No. 93-10494LC

Chapter 7

RHONDA GEARHART

Plaintiff(s)

Adversary No. 93-1184KC93-1184KC

vs.

TERRY L. GEARHART

Defendant(s)

ORDER

On May 25, 1994, the above-captioned matter came on for hearing pursuant to assignment. Plaintiff Rhonda Gearhart, n/k/a Rhonda Robinson, appeared with Attorney Steve Jackson. Debtor/Defendant Terry Gearhart appeared with Attorney John Stitely. Evidence was presented after which the Court took the matter under advisement.

Plaintiff asserts that Debtor has claimed exemptions for farming equipment and livestock beyond that allowed in Iowa Code § 627.6(11). She also asserts that Debtor has claimed more than the allowed amount of accrued wages including an income tax refund. Finally, she argues that Debtor has made a false oath about the extent of his assets and failed to explain loss of assets. This argument appears to be based on differences between assets and values listed in Debtors bankruptcy schedules compared to those listed in the parties' dissolution proceeding.

The evidence shows that there are some discrepancies between Debtor's original schedules filed March 22, 1993 and Debtor's past financial statements. Debtor amended his schedules January 3, 1994. These schedules appear to be more accurate. Debtor explained that some of his property is partially owned by other members of his family, specifically his father and brother. Also, much of the property Debtor claimed exempt actually had little actual value to the estate because of valid liens on the property.

Plaintiff is apparently asserting that Debtor should be denied a discharge under 11 U.S.C. § 727(a)(4), knowingly making a false oath in connection with the case, or § 727(a)(5), failure to explain loss of assets. The standard of proof on objections to discharge under 11 U.S.C. § 727(a) is a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 661, 112 L. Ed. 2d 755 (1991). Exceptions to discharge must be "narrowly construed against the creditor and liberally construed against the debtor. These considerations, however, 'are applicable only to honest debtors.'" In re Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (J).

For a discharge to be denied under § 727(a)(4), it must be shown that there has been an intentional untruth in a matter material to the bankruptcy case. 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 purposefully and with fraudulent intent. 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. In re Montgomery, 86 B.R. 948, 956 (Bankr. N.D. Ind. 1988); In re Simone, 68 B.R. 475, 478-79 (Bankr. W.D. Mo. 1983). Also, the court should not deny discharge if the untruth is a result of mistake or inadvertence of the debtor. In re Joslin, No. X88-01209S, Adv. No. X89-0012S, slip op. at 10 (Bankr. N.D. Iowa April 13, 1990); In re Cook, 40 B.R. 903 (Bankr. N.D. Iowa 1984).

The Court concludes that while there may have been omissions and errors in the filing of the schedules, they have since been explained and remedied. It appears that the original omissions arose from miscommunication between Debtor and his original attorney. The fact that Debtor amended the schedules militates against fraudulent intent.

Section 727(a)(5) states: "The court shall grant the debtor a discharge, unless . . . 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." In order to succeed in a § 727(a)(5) claim, the creditor must prove that the debtor at one time owned identifiable assets and that the assets are no longer available to the debtor's creditors. ITT Commercial Fin. Corp. v. Walz, 115 B.R. 353, 357 (Bankr. N.D. Fla. 1990). Denial of discharge under § 727(a)(5) is left to the sound discretion of the bankruptcy court. In re Suttles, 819 F.2d 764, 766 (7th Cir. 1987) (holding that grant of discharge was not abuse of discretion; bankruptcy court found that debtor's failure to keep satisfactory records was honest mistake).

Plaintiff asserts that Debtor should be denied discharge because different assets and values were placed on Debtor's financial statements in the parties' dissolution proceedings compared to the assets and values listed on Debtor's bankruptcy schedules. As previously noted, Debtor has now amended his schedules and further explained the extent of his ownership interests in the subject property. The record does not establish that Debtor owned identifiable property which is no longer available for the benefit of his creditors. Plaintiff has failed to prove a claim under § 727(a)(5) by a preponderance of the evidence.

WHEREFORE, Plaintiff's Complaint to Determine the Dischargeability of Debtor is DENIED.

FURTHER, Debtor shall not be denied discharge based on the allegations herein.

FURTHER, judgment is entered against Plaintiff Rhonda Gearhart and for Debtor/Defendant Terry L. Gearhart.

SO ORDERED this 17th day of June, 1994.

Paul J. Kilburg
U.S. Bankruptcy Judge