

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

PATRICIA ANN KINCAID
Debtor.

Bankruptcy No. 94-51011XS
Chapter 7

WIL L. FORKER, Trustee
Plaintiff

Adversary No. 94-5118XS

vs.

PATRICIA ANN KINCAID
Defendant.

ORDER RE: COMPLAINT TO DENY DISCHARGE

The matter before the court is the final trial of the Trustee's complaint to deny the debtor's discharge pursuant to 11 U.S.C. § 727 and for an order of turnover of property of the estate. Trial was held April 12, 1995 in Sioux City, Iowa. Wil L. Forker appeared as attorney for the Plaintiff-Trustee. Craig H. Lane appeared for the debtor, Patricia Kincaid. The court now issues its findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E) and (J).

Findings of Fact

Patricia Kincaid filed her Chapter 7 petition on June 17, 1994. Sometime in January 1994, she met with her attorney, Craig Lane, concerning filing a bankruptcy petition. At that time, she had brought her bills to Lane's office and filled out a questionnaire in the office. A couple of weeks later, when the petition and schedules had been typed, Kincaid returned to Lane's office. She met with a member of his office staff to review the papers and sign them. She did not meet again with Lane on this second visit.

Kincaid did not have the money for the filing fee and Lane's attorney fees when she saw him in January, 1994. After their first meeting, she made a payment of \$100.00 and made additional payments each payday. She expected that the bankruptcy petition would be filed when she had paid approximately half of what she owed and that she would have 90 days to complete the payments. She thought her petition had been filed sometime in February, 1994.

On the morning of March 29, 1994, Kincaid was in an auto accident. At that time, she still owed Lane \$150.00 for attorney fees. On or about June 14, 1994, Kincaid went to Lane's office to make the final installment on fees. She explained that she had not paid the fees earlier because she had been in an auto accident and had been off work. She learned then that the bankruptcy petition had not been filed

but now would be because the fees were paid. She spoke with a secretary during the June visit, but not with Lane. Kincaid's testimony is unclear as to what papers she saw on June 14. She looked at her petition and schedules briefly. Kincaid testified that she signed something on that day, but could not remember what it was. The court finds that she signed her petition and schedules in January; Lane signed and dated the petition and schedules on June 14, 1994. Kincaid did not have a discussion with anyone in June as to whether her schedules were still accurate.

The accident in March occurred while Kincaid was on her way to work. She was a passenger in a truck driven by Rick Morris, her boyfriend. His truck hit a patch of ice on the industrial exchange overpass south of Sioux City on I-29 and rolled three times. Kincaid was taken by ambulance to Marian Health Center where she was treated and released the same day. She was later treated by Dr. Roberts; she saw him approximately six times. In April, 1994, she had an MRI test at Marian Health Center, which showed a herniated disc. She was then referred to Dr. Reeder for treatment. She did not require surgery, but was treated with medication. She last saw Dr. Reeder in July, 1994, when he released her for work.

Kincaid works as a packer at Interbake Foods. She has worked there for 20-1/2 years. At the time of the accident, she was earning \$8.42 per hour for a 40-hour week. She earned \$12.63 for Saturday work. She returned to work in mid-July, after having been off work for three and a half months.

From July, 1993 until August, 1994, Kincaid lived with her two daughters, Kristin Pierce and Kari Pierce, at 1901 Riverside Boulevard, Sioux City. Their agreement was that Kincaid would pay the rent, which was \$400 per month, and her daughters would pay for all utilities. Kincaid's daughters paid the rent for April, May, June and July, 1994.

Rick Morris was insured through Farm & City Insurance Company. See Exhibit 3. Kincaid made a claim against Farm & City for her damages. On April 5, 1994, Morris reported the accident to his insurance agent, Warren Baker. On April 22, Kincaid sent Baker a letter regarding her claim. She expected she would receive a settlement to cover lost wages and medical expenses. Insurance adjuster Gary Hogue interviewed Kincaid on May 3, 1994. Kincaid sent Hogue copies of her medical bills.

In April and May, 1994, Farm & City paid \$417.00 for the ambulance, \$40.00 to Sioux City Family Physicians (Dr. Roberts), and \$543.00 to Marian Health Center under the \$1,000 medical benefits portion of Morris' policy. The balance of Kincaid's claim was to be paid from the bodily injury portion of the policy. Kincaid's employer did not complete the wage loss report form sent to it by Farm & City. Hogue verified Kincaid's hourly wage rate, then calculated her lost earnings using a 40-hour week for ten weeks, reduced by estimated withholding taxes, for a net of \$3,368.00. He calculated that the unpaid medical bills totaled \$1,781.22, of which \$1,177.19 was for the MRI. Exhibit 3, attachment to June 13, 1994 fax letter from Hogue.

On July 17, 1994, Hogue called Kincaid to make an offer of settlement for \$6,000.00. This was the only offer made to her. Kincaid accepted the offer. Hogue mailed her a form of release. On June 21, 1994, she received the release form, signed it and returned it. Exhibit 2.

Kincaid received the check for \$6,000.00 the first week in July. Kincaid testified that at that time she owed approximately \$40 to Dr. Roberts, \$400 plus the charge for the MRI to Marian Health Center, and \$400 to Dr. Reeder. Hogue's calculations as of June 13, 1994 were that Dr. Roberts had been paid, \$256.03 was owed to Marian Health Center in addition to the MRI, and \$353.00 was owed to the Marian Spine Clinic (Dr. Reeder). If Kincaid submitted all her bills to Hogue and her estimations

are correct, some of her medical bills may be post-petition debts. Kincaid's employer paid for the MRI. There was no evidence as to when the MRI bill was paid.

When Kincaid received the settlement check, she took it to Rick Morris' bank where she deposited \$3,000.00 in his bank account as payment for a 1985 Buick automobile. Morris had purchased the Buick earlier in the year. Morris signed the certificate of title over to Kincaid. She testified that she kept registration in Morris' name to avoid paying an additional fee before the registration expired. Kincaid gave \$1,600.00 of the settlement proceeds to her daughters to divide between themselves. She paid approximately \$200 on medical bills. Within a few weeks she spent \$600 for repairs on the Buick. The remaining approximately \$600 was spent on miscellaneous items including groceries, clothing and a trip.

On July 25, 1994, the day of her first meeting of creditors, Kincaid told Lane that she had received the settlement proceeds and told him how the money had been spent. At her meeting of creditors, Kincaid also disclosed this information to the Trustee. At the time of filing her bankruptcy petition, Kincaid's schedules were incorrect in a number of respects because of changes in her assets and liabilities since she signed the schedules in January. The claim against Rick Morris and Farm & City was not listed as an asset. Kincaid did not list her new debts to Marian Health Center, Dr. Roberts and Dr. Reeder. Kincaid's schedule of personal property listed a 1988 Dodge Omni valued at \$500. The car had very high mileage. Sometime between January and June, 1994, the engine blew up, and Kincaid gave the car to one of her daughters. Kincaid believed that the car was worth \$40.00 at the time of filing. She did not disclose the transfer of the car to her daughter on her statement of financial affairs.

Discussion

The Trustee's complaint is in three counts. Count I alleges that Kincaid concealed her personal injury claim and the subsequent settlement and should be denied her discharge for concealment of property of the estate pursuant to 11 U.S.C. § 727(a)(2). Count II alleges that Kincaid is not entitled to a discharge because her inaccurate schedules constituted a false oath under 11 U.S.C. § 727(a)(4)(A). Count III asks for judgment in the amount of \$6,000, the value of property of the estate Kincaid should have turned over pursuant to 11 U.S.C. § 542.

In Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654 (1991), the Supreme Court held that, although state law usually requires proof of fraud by clear and convincing evidence, the standard of proof in an 11 U.S.C. § 523 dischargeability proceeding is preponderance of the evidence. In *dicta*, the Court suggested that Congress intended the same standard of proof to apply in § 727 proceedings. *Id.*, 498 U.S. at 289, 111 S.Ct. at 660. The Tenth Circuit has held that the preponderance of the evidence is the standard of proof in a § 727 action. First National Bank of Gordon v. Serafini (In re Serafini), 938 F.2d 1156 (10th Cir. 1991). Several other courts have followed these decisions. See Kirk v. Boughner (Matter of Boughner), 173 B.R. 406, 409 (Bankr. S.D. Iowa 1994), and cases cited. The standard of proof in this adversary proceeding is preponderance of the evidence.

False Oath

The Trustee argues that Kincaid should be denied her discharge pursuant to § 727(a)(4)(A) for filing false schedules and failing to amend her schedules. That section provides:

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.

11 U.S.C. § 727(a)(4)(A). Bankruptcy schedule forms require the debtor to declare under penalty of perjury that the information provided is true and correct. Filing false bankruptcy schedules may constitute a false oath. See generally 4 Collier 727.04 (15th ed. 1995). There was no evidence that Kincaid's schedules were inaccurate at the time she signed them in January, 1994. However, on the date the petition and schedules were filed, the schedules did not show her claim against Morris and Farm & City, her new creditors, or the change in value and ownership of the Dodge Omni. Kincaid would not be entitled to a discharge if she knowingly and fraudulently allowed false schedules to be filed. The phrase "knowingly and fraudulently" means that the Trustee must show 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). The court should not deny discharge under § 727(a)(4)(A) where matters or property omitted are of 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). Courts should also not deny discharge if the untruth is a result of a mistake or inadvertence by the debtor. Bologna v. Cutignola (In re Cutignola), 87 B.R. 702, 706 (Bankr. M.D. Fla. 1988); 4 Collier 727.04 at 727-61 & n.14.

All the matters omitted from Kincaid's schedules are material. The personal injury claim is material because the amount would have been sufficient to pay creditors a substantial dividend. The failure to report the correct status of the Omni fails to disclose a transfer to an insider. Disclosure of the creditors would likely lead to discovery of the personal injury asset. However, the court finds and concludes that the Trustee has not shown that there has been an intentional untruth as to the items omitted from the schedules.

The court finds credible the testimony of Kincaid and her daughters that none of them believed that the daughters' payment of rent created a legal claim by the daughters against their mother. The mother and daughters had an informal arrangement of helping each other financially as each was able. Kincaid felt she had a moral obligation to repay her daughters. The court accepts Kincaid's explanation that omission of the transfer of the Omni and its change in value was inadvertent. The car had become nearly valueless through wear and mechanical problems. It is believable that she had forgotten about it. Kincaid testified that she had not added the medical creditors because she did not think she could add these "new debts" to her schedules. Although she knew on June 14 that the bankruptcy case had not been filed, she believed that the petition and schedules were final. An inordinate amount of time had passed between the date Kincaid signed her petition and the date it was filed. She did not meet again with Lane before the petition was filed. These unusual circumstances lend credibility to Kincaid's testimony. She mistakenly believed she could not add creditors to her schedules, and did not understand that she had a duty to make the schedules as complete as possible up to the date and time of filing. The court finds that the medical creditors were omitted through mistake.

The Trustee argues that the court should infer purposeful and fraudulent intent from Kincaid's omission of the personal injury claim, an asset of substantial value. Crews v. Topping (In re Topping), 84 B.R. 840, 842 (Bankr. M.D. Fla. 1988). At the time of her filing, Kincaid expected she would receive money in settlement for lost wages and medical expenses. She had been attempting to obtain some sort of payment since April, 1994. As of June 14, 1994, the last date Kincaid was in Lane's office before filing, she did not yet have an offer. She did not receive the settlement proceeds until July. Even assuming that Kincaid knew she should update her schedules to include new property acquired since January, it is believable that she did not think of her personal injury claim as a property

interest that she had already acquired. The property interest did not exist in January, 1994, the only time pre-petition that Kincaid met with Lane and the time at which she signed her schedules. If the claim had existed at that time, she presumably would have been alerted through her discussion with Lane to the necessity of scheduling it as an asset.

The fact that Kincaid's claim did not exist when she met with Lane and signed the schedules distinguishes Molstad v. Joslin (In re Joslin), X89-0012S (Bankr. N.D. Iowa Apr. 13, 1990), cited by the Trustee. Joslin's schedules were false at the time they were signed. He had executed his schedules one month before their filing. At the time he executed his schedules, Joslin knew he had made certain transfers and knew that he owned certain property but he chose not to disclose these facts. Id. at 11. The court found an intent to deceive.

The court finds that Kincaid's failure to list the claim was through mistake, and not an intent to deceive or a reckless indifference to the accuracy of her schedules. Again, the unusual circumstances of this case tend to negate the inference of fraudulent intent in omitting the asset. Many months had passed between the date Kincaid saw her attorney and the date on which the case was finally filed. Kincaid mistakenly believed that her case would be filed in January. When she returned to Lane's office in June she learned that the case had not yet been filed. However, she did not meet again with Lane at that time. No one alerted her to the possibility that she should then update her schedules. She mentioned to Lane's secretary in June that she had been in an accident. This is evidence of the absence of fraudulent intent. Legal counsel at that time likely would have led her to recognize the claim as a present property interest. The court concludes that the Trustee has not shown there has been an intentional untruth in Kincaid's schedules.

Moreover, the court will not find a false oath in Kincaid's failure to amend her schedules. Although a subsequent voluntary disclosure is some evidence of innocent intent, a false oath cannot be cured by amendment of the schedules. Montgomery, 86 B.R. at 957. Kincaid made a voluntary disclosure of the settlement to Lane on the day of her meeting of creditors. A subsequent amendment of the schedules would not have been dispositive on the issue of Kincaid's intent at the time of her filing. The Trustee's claim under § 727(a)(4) shall be dismissed.

Concealment of Property of the Estate

The Trustee also claims that Kincaid should be denied her discharge pursuant to § 727(a)(2). The Trustee argues that Kincaid concealed property of the estate by her failure to reveal the personal injury claim and by spending the settlement proceeds before the Trustee was able to discover the asset. Section 727(a)(2) provides:

- a. The court shall grant the debtor a discharge, unless--

* * *

2. 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, or has permitted to be 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.

11 U.S.C. § 727(a)(2)(A) and (B).

An objector to the debtor's discharge must show that the debtor had actual intent to hinder, delay or defraud creditors, and not merely constructive intent. First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1342-43 (9th Cir. 1986); 4 Collier 727.02[3] 727-15, 727-16. The Trustee must show evidence of intent beyond the transfers of money. Molstad v. Joslin (In re Joslin), X89-0012S, slip op. at 9 (Bankr. N.D. Iowa Apr. 13, 1990). However, actual intent may be established by circumstantial evidence, or by inference drawn from the debtor's conduct. Adeeb, 787 F.2d at 1343.

The court has concluded, in its discussion of the Trustee's § 727(a)(4)(A) claim, that Kincaid's omission of her personal injury claim was not an intentional untruth. For the same reasons given above, the court finds that Kincaid's failure to schedule the claim was not an intentional concealment of property of the estate under § 727(a)(2). See 4 Collier 727.04 at 727-63 to 727-64 (omission from schedules may give rise to claim for both false oath and concealment). The court will next discuss whether the manner in which Kincaid spent the settlement proceeds gives rise to an inference of dishonest or fraudulent intent that would justify denial of her discharge.

The Trustee argues that Kincaid's spending of the money shows a pattern of deceit. The court has found that Kincaid did not intentionally omit the personal injury claim from her schedules. It is reasonable to conclude further she did not think that the settlement proceeds were property of the bankruptcy estate which should have been delivered to the Trustee. It is likely then that she did not believe there were any particular restrictions on her use of the money. The court finds that Kincaid's expenditures were not so unreasonable as to give rise to an inference of an intent to hinder, delay or defraud creditors.

Kincaid's largest expenditure, \$3,600, was for the purchase and repair of the 1985 Buick. The car was a necessity for her transportation to work. At the time she received the settlement proceeds, Kincaid did not have a running car and knew she would soon be returning to work.

The next largest amount spent was \$1,600 paid to Kincaid's daughters. Kincaid testified that she wanted to give her daughters this money because they had helped her out at a time when they could not afford to do so. They had paid this amount for rent when Kincaid was not working.

The court cannot find dishonest intent in paying pre-petition medical bills because the settlement proceeds were intended to compensate Kincaid for her medical expenses. The Trustee argues that fraudulent intent should be inferred from Kincaid's payment of her daughters before paying her medical bills in full. However, the court does not infer from Kincaid's reimbursement of her daughters that she intended to defraud creditors. Although she did not consider her daughters to be creditors, she could reasonably desire to reimburse them for paying an expense she felt obligated to pay. Moreover, spending the settlement proceeds did not put her in a position of not being able to pay the medical bills. At the time she received the proceeds, Kincaid was preparing to return to work. Before her accident she apparently had income over her expenses that enabled her to make payments on Lane's attorney fees. Cf. Manufacturers Hanover Trust v. Davis (In re Davis), No. X91-0251F (Bankr. N.D. Iowa Aug. 21, 1992) (debtor could not reasonably believe she could make minimum payment on credit card debt incurred; fraudulent intent inferred for § 523(a)(2)(A) claim).

The Trustee cites Molstad v. Attrill (In re Attrill), No. X88-0210S (Bankr. N.D. Iowa Apr. 24, 1989), as a case in which the court denied the debtor's discharge under 11 U.S.C. § 727(a)(2)(A) for use of property of the estate for personal expenses. Attrill had scheduled a checking account with a balance of \$9.00. The correct balance was \$465.62. After filing, Attrill discovered the correct balance but did not disclose this to the trustee. Without making further deposits, Attrill wrote checks on the account. The court accepted Attrill's explanation that he did not know the correct balance at the time of

completing his schedules. However, the court denied Attrill's discharge for the use of property that Attrill knew was property of the estate. Id. at 11. The debtor's knowing use of property of the estate distinguishes Attrill from Kincaid's case. In Attrill, the debtor had listed the checking account on his schedules and knew that it was part of the bankruptcy estate. Nothing about the checking account changed between the time Attrill signed his petition and schedules and the time he used the property. In contrast, Kincaid's personal injury claim did not exist at the time she signed her petition. She likely did not think, at the time of her auto accident, that she had acquired a property interest. Months later, after the petition was filed, she received the settlement proceeds. She had not met with Lane since their first meeting in January. These circumstances tend to negate the inference that Kincaid knew that the money she received in July was property of her bankruptcy estate.

Turnover of Property of the Estate

Kincaid's claims against Rick Morris and Farm & City Insurance were property of the estate, having accrued March 29, 1994. The proceeds of the settlement were property of the bankruptcy estate, and the 1985 Buick purchased with the proceeds remains so. The proceeds of settlement would have been property that the Trustee could have used to pay Kincaid's creditors. She had a duty to deliver such property to the Trustee and account for such property or its value. 11 U.S.C. § 542(a). The Trustee is entitled to turnover of property of the estate regardless of Kincaid's knowledge about what constituted property of the estate or her intent in using the property. Section 542(c) creates an exception to the turnover requirement for good faith transfers by an entity without knowledge of the commencement of the case. However, the exception of § 542(c) is not applicable to transfers by Kincaid, who knew that she had filed a bankruptcy case. See Williams v. E.A. Martin Machinery Co. (In re Newman), 59 B.R. 670, 672 (Bankr. W.D. Mo. 1986) (§ 542 not applicable to the debtor's own transfers), *rev'd* on other grounds 875 F.2d 668 (8th Cir. 1989). Therefore, the court's rulings on the Trustee's claims under § 727 are not a defense to the Trustee's request for turnover order. Judgment shall enter against Kincaid for \$6,000.00, the value of the property of the estate she used.

The Trustee's remedies in this action are cumulative with any that he has against Kincaid's daughters, Kari Pierce and Kristin Pierce.

ORDER

IT IS ORDERED that the Trustee's complaint is granted in part and denied in part. The Trustee's claims under § 727 are dismissed. Patricia A. Kincaid shall be granted a discharge.

IT IS FURTHER ORDERED that the Trustee shall recover from Kincaid the sum of \$6,000.00. If the Trustee demands, Kincaid shall forthwith turn over the 1985 Buick automobile. Any net proceeds from its sale shall be applied toward this judgment. Costs shall be taxed to Kincaid. Judgment shall enter accordingly.

SO ORDERED THIS 2nd DAY OF MAY 1995.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U.S. mail to: Wil Forker, Debtor, Craig Lane and U. S. Trustee.