In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

DONALD W. STEINKE and
MARY V. STEINKE
Debtors.

Bankruptcy No. 93-51968XS

Chapter 7

WILLIAM ARTHUR GRESS
Plaintiff

vs.

DONALD W. STEINKE and
MARY V. STEINKE
Defendants

Adversary No. 94-5021XS

DONALD H. MOLSTAD, Trustee
Plaintiff

vs.

DONALD W. STEINKE,
MARY V. STEINKE
and JEFFREY STEINKE
Defendants

Adversary No. 95-5094XS

ORDER RE: COMPLAINT TO REVOKE DEBTORS' DISCHARGE

The matters before the court are the complaints filed by the Trustee and William Arthur Gress to revoke or deny the debtors' discharge, to avoid a fraudulent transfer and to obtain judgment for the amount of the transfer. The matters were tried December 14, 1995 in Sioux City, Iowa. Donald H. Molstad appeared for himself as Trustee. James B. Cavanagh appeared for Gress. Wil L. Forker appeared for defendants Donald W. Steinke and Mary V. Steinke. On December 21, 1995, Gress filed a post-trial brief. 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)(H) and (J).

Procedural History

Donald and Mary Steinke filed a Chapter 7 bankruptcy petition on December 7, 1993. The deadline for filing complaints to object to their discharge or to determine the dischargeability of debts was March 11, 1994. The deadline was extended for the Trustee until May 10, 1994. On March 10, 1994, Gress filed a complaint styled "Complaint to Determine Objection to Dischargeability of Debt." Adversary No. 94-5021XS. The complaint was not a model of clarity. While the complaint expressly referred to 11 U.S.C. § 523, it also contained a paragraph alleging a claim under 11 U.S.C. § 727:

> The Debtor, Donald W. Steinke, may have transferred, removed, or concealed property of the estate and has

failed to satisfactorily explain the disappearance or loss of assets.

Complaint, ¶ 2. The clerk noted in the case file that the adversary proceeding was one under 11 U.S.C. § 523. Donald and Mary Steinke filed an answer March 21, 1994 without objection to the form of the pleading. See Fed.R.Civ.P. 9(b) (requiring particularity in allegations of fraud); Fed.R.Civ.P. 12(e) (motion for more definite statement). Their motion to strike the § 727 claim, filed July 19, 1995, was denied because the case had progressed to the point of being ready for trial. The confusing pleading led to the clerk's entry of the Steinkes' discharge on May 13, 1994.

On June 7, 1995, the Trustee filed a complaint in two counts against the Steinkes and their son, Jeffrey Steinke. Adversary No. 95-5094XS. Count I alleged that the Steinkes' discharge should be revoked for their actions in connection with an undisclosed fraudulent transfer. Count II sought to avoid the fraudulent transfer pursuant to 11 U.S.C. § 548 and to obtain judgment against all defendants for the amount transferred. The complaint was amended November 13, 1995, to add Count III alleging that the Steinkes made a false oath regarding the sale of a vehicle.

The parties determined that the two complaints overlapped; some claims involved the same issues of fact. The underlying substantive claim of each plaintiff was that the Steinkes made a fraudulent transfer. On October 30, 1995, the court consolidated the two cases for trial on the issues under § 727 and § 548.

The discharge entered in error. The judgment here will include an order vacating the discharge order. If the discharge had not entered by mistake, the Trustee's complaint would have been a complaint to deny discharge filed after the deadline to file such a complaint. If timeliness of the complaint is a problem, however, it was not raised by the defendants.

The Trustee is in a similar position as the plaintiff in First Interstate Bank of Sioux City v. Ratka (In re Ratka), 133 B.R. 480 (Bankr. N.D. Iowa 1991). In Ratka, plaintiff bank filed a complaint objecting to the debtors' discharge five days after the deadline for § 727 complaints. The complaint included allegations of post-petition misconduct by the debtors. The court said that to the extent the complaint was based on 11 U.S.C. § 727(a), it was filed untimely. However, to the extent it stated a claim to revoke the discharge under 11 U.S.C. § 727(d), it was premature. The court stated that in such a situation, the complaint would be treated as a complaint to revoke the discharge. Id., 133 B.R. at 483. The plaintiff must prove "fraud in the procurement of the discharge and also that grounds existed which would have prevented the discharge had they been known and presented in time." Id., citing In re Meo, 84 B.R. 24 (Bankr. M.D. Pa. 1988). The Trustee's complaint alleges that he became aware of the alleged fraudulent transfer after the deadline for filing a § 727 complaint. The Trustee filed and tried the complaint as one to revoke the discharge. Therefore, he is not prejudiced by treating the discharge as vacated.

In his opening statement at trial, the Trustee advised the court that he had reached a settlement with defendant Jeffrey Steinke. On December 28, 1995, the Trustee filed a motion to compromise his claim against Jeffrey Steinke for $2,500. Notice of the motion set a deadline of January 18, 1996 for filing objections to the proposed compromise. No objections have been filed. The trustee's compromise with Jeffrey Steinke has been approved by separate order. Adversary No. 95-5094XS will remain open pending dismissal of Jeffrey Steinke based on the settlement. However, the court finds that there is no just reason to delay entry of judgment as to defendants Donald and Mary Steinke. This order shall be a final judgment as to them.

Findings of Fact

Donald Steinke is 58 years old. He has a degree in mechanical engineering and a master's degree in business administration. Mary Steinke has two years of college education in liberal arts. The Steinkes have been married for 37 years.

Donald Steinke was employed as an engineer for 17 years. He was then the general manager of a small business in Iowa for an additional 17 years. As a result of corporate restructuring, he lost that position. He found his job prospects limited and began looking for a business to own. The Steinkes purchased an agri-business from Gress. They made a substantial down payment on the purchase price and made payments on the balance under an installment contract. The Steinkes incorporated the business as Mardon, Inc. They were shareholders and officers of the corporation. For three years, they

conducted the business in Charter Oak, Iowa.

Norwest Bank was Mardon's primary lender. Mardon borrowed money from Norwest to start up and operate the business and to make improvements. The Steinkes personally guaranteed each loan. The business had cash flow problems from the beginning. On May 5, 1993, Mardon borrowed an additional $100,000. Mardon filed a Chapter 11 bankruptcy petition on June 17, 1993. The business continued to operate for a time. During the Chapter 11 the Steinkes received salary of approximately $3,025 per month from July through November, 1993. The Steinkes were not successful in their efforts to reorganize the business. The case converted to a case under Chapter 7 on November 15, 1993.

In October, 1993, Norwest began to offset against Steinkes' personal assets to collect corporate debt guaranteed by Steinkes. Norwest liquidated their certificates of deposit and Johnson Controls stock. Exhibit 9, Statement of Financial Affairs, question 10. At about the same time, the Steinkes began to liquidate some of their personal assets. They sold a boat, motor and trailer to their daughter for $1,325. They received $27,000 from liquidating their IRAs. They used $20,000 of the IRA proceeds to purchase life insurance policies and used the rest for living expenses. Id.

The Steinkes also sold a 1982 Ford pickup to John Greeder. The sale price for the pickup was $700. The Steinkes said in response to question 10 of their statement of affairs that they sold the pickup in October, 1993 and used the sale proceeds for living expenses. At their meeting of creditors, the Steinkes indicated to the Trustee that no one owed them money. Under examination by the Trustee in September, 1995, Donald Steinke said that Greeder's check for the pickup was not honored, that he took the check to an attorney for collection, and that he eventually received cash post-petition. At trial Donald Steinke testified that he took the dishonored check to Greeder's attorney and that Greeder then gave Steinke $650 cash in a pre-petition settlement. The Trustee's examination in September, 1995 was approximately two years after the sale. The court finds that Steinke received a $650 cash settlement for the sale of the pickup prior to filing the Chapter 7 petition.

At about the same time that Mardon converted to a Chapter 7 case, the Steinkes decided to file bankruptcy personally. They filed a Chapter 7 petition December 7, 1993. The Steinkes' bankruptcy schedules show that they owed Norwest a total of $225,000, and that Norwest's unsecured claim was $128,000. Exhibit 9, Schedule D.

Jeffrey Steinke is the debtors' son. He has a bachelor's degree and an M.B.A. degree in finance. He is divorced and has no children. In October, 1991 he moved from Waverly, Iowa to Houston, Texas. He obtained employment there selling insurance products and mutual funds on commission. In June, 1993, he obtained his present position as a salaried marketing communications specialist for an insurance company. Exhibit 10, Deposition of Jeffrey Steinke, page 6. Since moving to Houston, Jeffrey Steinke has maintained contact with his parents through frequent telephone calls and occasional visits in person.

Donald and Mary Steinke visited their son in Houston for Christmas in 1992. Jeffrey's divorce had become final in November that year. They visited him again in April or May, 1993. They told him at that time they were going to give him some money. Exhibit 10 at 11, 41.

On June 8, 1993, the Steinkes paid their attorney, Alvin J. Ford, a retainer of $10,000 for the Mardon Chapter 11 case. On June 9, 1993, Mary Steinke opened a joint account for herself and her husband at National Bank of Iowa in Denison, Iowa with a beginning balance of $890. On June 15, 1993, she took $10,600 from her savings account at Norwest Bank, Fort Dodge, Iowa, and deposited it into the National Bank account. On June 29, 1993, she wrote a check on the National Bank account for $10,000 payable to Jeffrey Steinke. Exhibit 8. Donald Steinke knew that Mary was going to transfer this money. On July 2, 1993, Jeffrey Steinke deposited the $10,000 in his savings account at American General Federal Credit Union in Houston, account number 39-574240-1-0. Exhibit 1. Jeffrey Steinke opened this account with the $5.00 minimum deposit when he joined the credit union. He had made no other deposits to the savings account prior to the deposit of the $10,000 from his mother.

At the time he received the $10,000, Jeffrey Steinke did not owe attorney fees from his divorce. He had a car loan and credit card debt of approximately $5,000 to $6,000. He was current with all payments. In the past his parents had given him money for specific needs. They paid for his college education, gave him $2,500 when he was married, and gave him $2,500 after he had had an auto accident.

Between July, 1993 and June, 1994, Jeffrey Steinke returned $8,190.82 of the $10,000 to his parents or to creditors for the benefit of his parents. See Exhibit 1; Exhibit 10 at 35. Both Donald and Mary Steinke knew of each transfer made to them or for their benefit. Jeffrey Steinke withdrew cash from his savings account, or transferred money to his checking account at the credit union in order to write checks to his parents or to their creditors. In October, 1993, he sent $225 to his parents. In November, 1993, he went home for Thanksgiving and gave his parents $400 cash. His parents came to visit him for Christmas in 1993, at which time he gave them $700 cash. Exhibit 10 at 19. On February 16, 1994, Jeffrey Steinke sent a check for $1,389.36 directly to Farmers State Bank for his parents' quarterly house payment. Exhibit 2. At about the same time he sent his parents $600. In March, 1994 he sent another $400. On April 21, 1994 he sent a check for $1,000 to Alvin Ford for his parents' attorney fees. Exhibit 3. On May 4, 1994, he wrote a check to Mary Steinke for $300. Exhibit 4. On May 31, 1994, he sent her a check for $1,500. Exhibit 5. He received an insurance premium statement from his parents and on May 26, 1994, he paid the premium with a check for $287.10 sent directly to Tri-State Insurance Co. Exhibit 6; Exhibit 10 at 31. On June 1, 1994, he again sent a quarterly house payment in the amount of $1,389.36 to Farmers State Bank. Exhibit 7. These payments by Jeffrey Steinke total $8,190.82.

Question 7 in the statement of financial affairs asks whether the debtors made pre-petition gifts; question 10 asks whether they made other pre-petition transfers. The Steinkes did not reveal the transfer of $10,000 to their son on their statement of financial affairs. At their meeting of creditors the Steinkes were asked again about gifts and transfers prior to their bankruptcy filing. They did not disclose the $10,000 transfer. The Trustee first learned of the transfer after an examination by Gress conducted in December, 1994.

Sometime post-petition, Donald Steinke began receiving benefits from a retirement plan sponsored by his last employer. The Steinkes' schedules did not list an interest in a retirement plan. The plan was not in evidence. The Steinkes testified that the plan was a defined benefit plan and that Donald Steinke had not made contributions to it.

Discussion

The court will first address the Trustee's claim that the transfer of $10,000 to Jeffrey Steinke was a fraudulent transfer avoidable under 11 U.S.C. § 548. That section provides:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--
>
> (1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted.

11 U.S.C. § 548(a)(1). The transfer of the Steinkes' money on June 29, 1993 was within one year of their December 7, 1993 petition filing date. The issue is whether the transfer was made with actual intent to hinder, delay or defraud creditors.

Direct evidence of fraudulent intent is rarely available. The Trustee may prove intent through circumstantial evidence or "badges of fraud." Montey Corp. v. Maletta (In re Maletta), 159 B.R. 108, 112 (Bankr. D. Conn. 1993).

> Such badges of fraud include reservation of rights in or the beneficial use of the transferred assets; inadequate consideration; close friendship or relation to the transferee; the financial condition of the transferor both before and after the transfer; and ... a "pattern" of falsity or a "cumulative effect" of falsehoods.

Id. (citations omitted).

The Steinkes' transfer to their son put the money out of reach of creditors but not beyond their own control. They retained the benefit of the money because they were able to retrieve it by telling Jeffrey of specific debts that were

coming due. Exhibit 10 at 44. In fact, he returned nearly all of it to them or their creditors.

A significant badge of fraud in this case is the timing of the transfer. The money was taken out of a Norwest account two days before Mardon, Inc. filed its Chapter 11 petition, at a time when personal assets of Steinkes were pledged to Norwest, their primary business lender. The Steinkes claim that they made their son a gift because he had gone through a divorce and was not doing well at his job. They claim that the decision to give the gift was triggered by their 1992 Christmas visit. However, they did not know what his income was at that time or the amount of any of his debts. Jeffrey Steinke said his parents first told him they would give him money in April or May of 1993. The transfer was not made until the end of June. At the time Jeffrey actually received the money, he had no overdue bills and had just changed to a much higher paying job with more stability. He perceived himself in no emergency situation and put the money in savings for something to "fall back on." Exhibit 10 at 16.

The Steinkes' explanations of their conduct are implausible in several respects. Mary Steinke's explanation of why she transferred the money to a new bank account before sending it to her son was, essentially, that she could do what she liked with her own money. However, the inference that she took the money out of a Norwest account to keep the bank from reaching the funds is inescapable. The Steinkes' claims that the timing of the transfer was a coincidence, that fortuitously their son did not need the money, and that he happened to return the money to them because he knew they needed it, are also not credible. Jeffrey Steinke returned the money because his parents told him of specific debts that were coming due. Exhibit 10 at 44. The Steinkes could not explain why the money was returned to them in several odd amounts rather than the balance of the $10,000 in one lump sum. Jeffrey said that he sent money directly to creditors because that method was easier. Exhibit 10 at 26, 28. It would have been far simpler, however, to mail a check to his parents. Instead, he had to write several checks and mail them to various addresses. He had to obtain the note number for the home mortgage payment and had to enclose a statement with the insurance premium. The implication from the Steinkes' course of conduct is that they were attempting to conceal the source of the money. Jeffrey filtered the money back to his parents, supposedly because they needed it to pay living expenses. During this same period, however, the Steinkes had $20,000 available to invest in exempt life insurance policies.

The court finds and concludes that the Steinkes transferred the $10,000 to their son with actual intent to hinder, delay or defraud their creditors. Therefore, the transfer will be avoided and judgment entered against the Steinkes for recovery of the transfer under 11 U.S.C. § 550(a)(2).

The court will next consider the claim of Gress that the Steinkes are not entitled to a discharge pursuant to 11 U.S.C. § 727(a)(2). That section provides that the court shall grant the debtor's 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.

The elements of § 727(a)(2) overlap those of § 548. The court's foregoing findings and conclusions that the Steinkes transferred their property within one year before their bankruptcy filing with actual intent to hinder, delay or defraud creditors support a conclusion that their discharge should be denied pursuant to § 727(a)(2).

The court will next address the Trustee's § 727 claims. As discussed above, the Trustee's complaint is, procedurally, a late-filed claim to deny discharge. However, because the Trustee alleges post-petition conduct which prevented him from learning of the Steinkes' fraud, the Trustee is permitted to proceed under § 727(d)(1). First Interstate Bank of Sioux City v. Ratka (In re Ratka), 133 B.R. 480, 483 (Bankr. N.D. Iowa 1991). Section 727(d)(1) provides that the court shall revoke the debtor's discharge if:

> such discharge was obtained through the fraud of the debtor, and the [Trustee] did not know of such fraud until after the granting of such discharge.

11 U.S.C. § 727(d)(1).

The Trustee claims that the Steinkes obtained their discharge through false oath in connection with two transfers, the

$10,000 to their son and the sale of a Ford pickup to John Greeder. The Trustee claims that the Steinkes made a false oath in their schedules and at their meeting of creditors, concealing conduct for which they would have been denied a discharge, thereby obtaining discharge through fraud. The Trustee must first show that the Steinkes' conduct was not known or discoverable prior to the deadline for objecting to their discharge. In re Ratka, 133 B.R. at 483; 4 Collier on Bankruptcy ¶ 727.15[3] (15th ed. 1995). The Trustee has established this element. The evidence shows that the Trustee discovered the $10,000 transfer no earlier than December 1994, after his May 1994 deadline to file a § 727 complaint. Steinkes failed to disclose the transfers when the Trustee questioned them about transfers at the meeting of creditors. The Trustee learned in September 1995 that the information in the statement of affairs regarding the sale of the pickup was not accurate.

The Trustee must next prove that the discharge was obtained through fraud. "Fraud of a debtor such as would warrant revocation of a discharge is fraud in the procurement of a discharge and not mere fraud as to a particular creditor." Worthen Bank & Trust Co. v. Perryman (In re Perryman), 111 B.R. 227, 229 (Bankr. E.D. Ark. 1990). 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. Ratka, 133 B.R. at 483; Gibson v. Barber, 104 B.R. 425, 426 (Bankr. N.D. Fla. 1989). Proof of a debtor's false oath would justify revocation of the discharge. See West Suburban Bank of Darien v. Arianoutsos (In re Arianoutsos), 116 B.R. 116, 118 (Bankr. N.D. Ill. 1990) (discharge obtained through fraud in filing false schedules may be revoked); Gibson v. Barber, 104 B.R. at 426 (intentional omission of assets would be grounds to revoke discharge). Therefore, cases decided under 11 U.S.C. § 727(a)(4)(A), objection to discharge for false oath, are relevant to the analysis of the Trustee's § 727(d)(1) claims.

A debtor is not entitled to a discharge if the debtor "knowingly and fraudulently, in or in connection with the case ... made a false oath or account." 11 U.S.C. § 727(a)(4)(A). Each debtor in a joint petition has the duty to sign the schedules and Statement of Financial Affairs under penalty of perjury. The debtor declares under oath that they are "true and accurate." Debtors are examined under oath at their meeting of creditors. A claim of false oath may be based on statements made by debtors in their schedules and statement of financial affairs or at their meeting of creditors. Montey Corp. v. Maletta (In re Maletta), 159 B.R. 108, 112 (Bankr. D. Conn. 1993).

The debtor's fresh start afforded by the Chapter 7 discharge is for the honest but unfortunate debtor. Graven v. Fink (In re Graven), 936 F.2d 378, 385 (8th Cir. 1991), citing Grogan v. Garner, 498 U.S. 279, 286-87, 111 S.Ct. 654, 659 (1991). "A discharge is a privilege and not a right and therefore the strict requirement of accuracy is a small quid pro quo. The successful functioning of the Bankruptcy Code hinges upon the [debtor's] veracity and his willingness to make a full disclosure." Hillis v. Martin (In re Martin), 124 B.R. 542, 547-48 (Bankr. N.D. Ind. 1991). Full disclosure is a prerequisite to obtaining a discharge. American State Bank v. Montgomery (In re Montgomery), 86 B.R. 948, 956 (Bankr. N.D. Ind. 1988), citing Secretary of Labor v. Hargis (In re Hargis), 50 B.R. 698, 700 (Bankr. W.D. Ky. 1985). "Deliberate omissions by the debtor may ... result in the denial of a discharge." Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 618 (11th Cir. 1984). The Trustee need not show detriment to creditors, nor does it matter whether or not the debtor intended to injure his creditors. Id. For a discharge to be denied under § 727(a)(4)(A), the Trustee must show that 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). A matter is material to a case if it bears a relationship to the debtor's personal transactions, or concerns the discovery of assets, financial dealings, or the existence and disposition of the debtor's property. Palatine National Bank v. Olson (In re Olson), 916 F.2d 481, 484 (8th Cir. 1990); Chalik, 748 F.2d at 618.

The Steinkes said in their statement of affairs that they sold a Ford pickup for $700. This was a false statement. The Steinkes received $650 from the sale. Because the court has found that the Steinkes received the money in settlement pre-petition, it was not a false statement for the Steinkes to indicate at their meeting of creditors that there was no debt owed in connection with the sale. The court should not deny discharge under § 727(a)(4)(A) where matters or property omitted are of a trivial nature or of negligible value. In re Montgomery, 86 B.R. at 956. 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). The Trustee has not met his burden of proving that the statement was made knowingly and fraudulently. The small size of the discrepancy as to the vehicle's sale price makes it more likely that the false statement was made through inadvertence. The Steinkes admit that their statement of affairs was false as to the transfer of $10,000 to their son, and that they did not disclose the transfer to the Trustee at their meeting of creditors.

The transfer is significant for its size regardless of the amount of the Steinkes' total indebtedness. The transfer is material to their bankruptcy case under the Eighth Circuit standard because it relates to the discovery of their assets and the disposition of their property. Olson, 916 F.2d at 484. In the absence of a credible explanation, the court may infer fraudulent intent from an unexplained false statement. MacLeod v. Arcuri (In re Arcuri), 116 B.R. 873, 884 (Bankr. S.D.N.Y. 1990). The court may also infer fraudulent intent under § 727(a)(4)(A) if a debtor shows a reckless indifference to or disregard for the truth. In re Maletta, 159 B.R. at 112, quoting In re Arcuri, 116 B.R. at 883. Where assets of substantial value are omitted from the schedules, the court may conclude that they were omitted purposely and with fraudulent intent. Crews v. Topping (In re Topping), 84 B.R. 840, 842 (Bankr. M.D. Fla. 1988). The Steinkes failed to disclose a sizable transfer. The court has found the transfer itself was fraudulent. The inference is that the Steinkes fraudulently omitted the transfer from their statement of affairs. Although not necessary for this decision, the omission of Donald Steinke's interest in a retirement plan is additional evidence of disregard for the accuracy of the schedules.

The Steinkes had little explanation for their failure to disclose the transfer of the $10,000. They said they were under stress when they signed the bankruptcy schedules and during their meeting of creditors. They claim they did not think the questions asked of them referred to the transfer to their son. They said that they told their attorney, Alvin Ford, of the transfer on more than one occasion. The Steinkes are intelligent people. They do not claim that they did not understand the questions asked of them about gifts or other transfers. The court finds that the Steinkes knew that the questions asked of them called for disclosure of the transfer. They intentionally chose not to disclose the information.

The Steinkes' primary defense is advice of counsel. This explanation is not adequate to rebut the inference of fraudulent intent. Mary Steinke could not recall what Ford said about reporting the transfer. It is not credible that Ford, an experienced bankruptcy attorney, would advise the Steinkes to omit from the statement of affairs a $10,000 transfer to a relative made within six months of filing. If Ford had forgotten to include the information, the Steinkes could have amended their filing, which they did not do. The Steinkes obtained new counsel for trial, making Ford available as a witness. He was not subpoenaed for trial. The Steinkes' intent in not disclosing the transfer was a critical issue. The Steinkes' failure to call Ford as a witness, considering the importance of corroborating testimony, makes their defense even less credible. See In re Maletta, 159 B.R. at 113 (uncorroborated testimony of advice of counsel was not persuasive). Even assuming for argument that the Steinkes told Ford of the transfer and that Ford advised them not to disclose the transfer, it would have been unreasonable for the Steinkes to rely on such advice. City National Bank of Fort Smith, Arkansas v. Bateman (In re Bateman), 646 F.2d 1220, 1224 (8th Cir. 1981) (unreasonable to exclude income and gift from statement of affairs on advice of counsel; argument did not rebut presumption of fraudulent intent); see also In re Maletta, 159 B.R. at 112 (false statement made knowingly; debtor not exonerated by reliance on patently improper advice of counsel).

The court finds and concludes that the transfer was knowingly and fraudulently omitted in an effort to conceal the fraudulent transfer and the final disposition of the money. The Steinkes made a false oath in their statement of affairs and at their meeting of creditors in relation to the transfer of $10,000 to their son Jeffrey Steinke. Because the Trustee has established that grounds existed for the denial of the Steinkes' discharges and that he was unable to discover the grounds in time to object to their discharge, the Steinkes are not entitled to a discharge pursuant to 11 U.S.C. § 727(d)(1).

ORDER

IT IS ORDERED that the discharge order entered in the case of Donald W. Steinke and Mary V. Steinke, Bankruptcy No. 93-51968, dated May 13, 1994, is vacated.

IT IS FURTHER ORDERED that the discharge of Donald and Mary Steinke is denied pursuant to 11 U.S.C. § § 727(d)(1), 727(a)(2) and 727(a)(4)(A).

IT IS FURTHER ORDERED that the transfer of $10,000 to Jeffrey Steinke is avoided as a fraudulent transfer.

IT IS FURTHER ORDERED that Trustee Donald H. Molstad shall recover from Donald and Mary Steinke the sum of $10,000.

IT IS FURTHER ORDERED that Adversary No. 95-5094XS shall remain open pending dismissal of Jeffrey Steinke based on his settlement with Trustee Donald H. Molstad. The court has determined that there is no just reason for delay and directs that final judgment enter against Donald and Mary Steinke. Judgment shall enter accordingly.

SO ORDERED THIS 29th DAY OF JANUARY 1996.

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: Donald Molstad, Alvin Ford, 2002 List, John Bouslog and U.S. Trustee.