In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

MARLIN J. GUNDERSON aka Amazing Grace Ministries and JULIE D. GUNDERSON aka Julie D. Schmit *Debtor(s).*	Bankruptcy No. 95-51746XS Chapter 7
WIL L. FORKER Trustee *Plaintiff(s)* vs. MARLIN J. GUNDERSON aka Amazing Grace Ministries and JULIE D. GUNDERSON aka Julie D. Schmit *Defendant(s)*	Adversary No. 95-5163XS

ORDER RE: TRUSTEE'S OBJECTION TO DISCHARGE

The matter before the court is the final trial of the trustee's objection to the debtors' discharges on grounds of fraudulent transfer or concealment and false oath. Trial was held February 6, 1997. Trustee Wil L. Forker appeared for himself.

A. Frank Baron appeared for Debtor-Defendants Marlin J. Gunderson and Julie D. Gunderson. 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)(J).

FINDINGS OF FACT

Gundersons filed a joint Chapter 7 petition on September 13, 1995. Gundersons have been married about five years. Julie Gunderson has three children, ages 12, 16 and 16, from a previous marriage which ended when she was widowed. Marlin Gunderson filed a prior bankruptcy case in South Dakota in the early 1980s.

Marlin Gunderson attended college for three years and five months at Vermillion, South Dakota. He received a two-year degree from LaJunta Junior College in Colorado, and took courses there for an additional 12 months. He also spent two and a half years in seminary.

On the date of the petition, Marlin Gunderson was engaged in two businesses. One was a counseling service for which he used the name Amazing Grace Ministries.[(1)] This business has been his own

endeavor and not in affiliation with a church or other organization. He is also the sole proprietor of a business called Gunderson Saddlery and Tack. In the Statement of Financial Affairs, he stated that he had no income of any type for 1995 as of the date of his petition in September. Exhibit 1, Questions 1 and 2. Gundersons reported that they were not engaged in any businesses. Id., Question 16.

Julie Gunderson has worked as a computer technician. Exhibit 10, 1994 Form 1040. She reported income only from an unemployment benefit in 1995 as of the date of the petition. Exhibit 1, Statement of Financial Affairs, Questions 1 and 2.

Gundersons' Schedule B showed they owned the following personal property:

Savings account at First Federal Savings	50.00
Checking account at Dakota Territory Federal Credit Union	50.00
Household goods	795.00
Clothing	150.00
Wedding rings	250.00
1981 Eagle	500.00
1983 Chrysler	1,200.00
1984 Chevy Pickup	1,500.00
1987 Nissan Stanza	3,500.00
1992 Nissan Pathfinder	15,000.00
3 horses	150.00

Exhibit 1.

Gundersons' bankruptcy attorney was Kay Dull. Dull interviewed Julie Gunderson for the purpose of preparing the bankruptcy petition, statement and schedules. Marlin Gunderson did not attend the interview. Dull's notes show that Julie Gunderson, when asked about jewelry owned, told Dull they had a wedding ring worth $250 and a diamond ring pledged to Helzberg worth $2,000. Exhibit D, page 2. Dull noted that one of Gundersons' secured creditors was AVCO, and listed its collateral as two vehicles, "jewelry, watch." Exhibit D, page 4. The ring pledged to Helzberg and the watch were not listed on Gundersons' schedule of personal property.

Gundersons signed their petition and schedules on August 21, 1995. The documents were filed September 13, 1995. On September 27, 1995, Gundersons amended their schedules to add Marlin Gunderson's Social Security number. Case file No. 95-51746-XS, Doc. 7.

On October 16, 1995, Trustee Forker examined the Gundersons at their meeting of creditors. Dennis Neuroth, representing Sears, and Mark Buehler, senior branch manager of AVCO Financial Services, were present. Upon questioning by Forker, Gundersons disclosed that they owned a Rolex watch and several items of jewelry which had not been scheduled. Exhibit 11, pages 5-6. These items were collateral for a loan from AVCO. Exhibits 3, 4. Upon questioning by Buehler, Gundersons disclosed that they had a large loan with Dakota Territory Federal Credit Union secured by an account with a balance approximately equal to the amount of the loan. Exhibit 11, pages 12-14. Upon further questioning by Forker, Marlin Gunderson disclosed his saddle and tack business and said that, on the date of the filing of the petition, he owned seven or eight saddles. Id. at 19.

On December 4, 1995, Gundersons filed an amendment to their schedules. Exhibit 2. They amended Schedule D to add Dakota Territory Federal Credit Union as a creditor with a claim in the amount of $27,159.31, secured by share drafts in the amount of $25,223.16. They also listed the following items as additional collateral for the debt to AVCO:

1 - Man's 14K Gold Watch	$8,000.00
1 - .77 ct. Diamond Ring	$2,295.00
1 - 1.5 ct. Diamond Ring	$1,995.00
1 - .75 ct. Diamond Ring	$2,995.00
1 - 2 ct. Diamond Ring	$3,000.00
1 - Cultured Pearl Necklace and Earrings	$1,500.00

Gundersons valued the watch and jewelry at the same dollar amounts shown on the attachment to AVCO's security agreement. See Exhibit 4. They used an appraisal done in January, 1995 in listing the value of the Rolex watch. Exhibit 5. Gundersons amended Schedule B to show their interest in the $25,223.16 in share drafts at the credit union. They also deleted the three horses from Schedule B for the reason that the horses belong to their children.

Forker determined that AVCO did not have a perfected security interest in the jewelry. He took possession of the jewelry and had it appraised. Exhibit 8. The ring that had been described as a 1.5 carat diamond valued at $1,995.00 was not a true diamond ring. The stone was instead what has been described by the parties as "cubic zirconia" or "CZ." The court will also refer to it as the "cubic zirconia ring." Cf. Webster's II New Riverside University Dictionary 1340 (1984) ("zircon" is a "brown to colorless mineral, essentially $ZrSiO_4$, the transparent form of which is cut and polished to form a brilliant blue-white gem"). The ring was appraised at $318.00. On October 19, 1995, Forker filed a complaint objecting to the Gundersons' discharge; he amended the complaint on May 30, 1996.

DISCUSSION

The Trustee claims the Gundersons should be denied their discharges for their failure to disclose assets. He alleges the Gundersons have made false oaths and have concealed property with an intent to hinder, delay or defraud creditors. The Trustee made additional claims specific to the Gundersons' conduct in relation to the cubic zirconia ring and their failure to disclose the saddles. Amended complaint, Counts III, IV. The claim identified as Count V referred to the Gundersons' failure to turn over a diamond ring. Forker reported in his opening statement that the ring had been turned over, and he orally withdrew the claim. The Trustee must prove each element of his claims by a preponderance of the evidence. Montey Corp. v. Maletta (In re Maletta), 159 B.R. 108, 111 (Bankr. D. Conn. 1993).

A debtor who has "knowingly and fraudulently, in or in connection with the case ... made a false oath or account" is not entitled to a discharge. 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 correct." 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. In re Maletta, 159 B.R. at 112.

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.

Gundersons' initial schedule of personal property omitted the following items: Dakota Territory Federal Credit Union account in the amount of $25,223.16; Rolex watch appraised at $8,000 (Exhibit 5); four rings, previously valued by Gundersons at a total of $10,285 (Exhibit 4); cultured pearl necklace and earrings, valued at $1,500 (Exhibit 4); and seven or eight saddles valued in the aggregate at approximately $1,600 to $1,900 (see Exhibit 11, p. 19-20). The Gundersons' schedule of personal property contained false statements; the omissions were material.

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 112-13, 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).

Julie Gunderson said she told attorney Dull at the initial interview about the Rolex watch, each item of jewelry, the account at the credit union, and her husband's saddle and tack business. Gundersons claim items were omitted from the schedules because of Dull's mistakes. They claim that, although they knew the petition and schedules were not accurate when they signed the documents, they brought errors to Dull's attention and were assured that they could be corrected later. They claim they relied on their attorney and had no intent to defraud.

The Gundersons did not fully disclose matters to their attorney. Gundersons' defense requires the court to believe that Dull, after being told of the property, forgot about it three times: when she made her notes, when the schedules were prepared, and at the meeting of creditors. Other than the ring pledged to Helzberg and the watch secured to AVCO, none of the particular items omitted from the schedules appear in Dull's notes from the interview. The petition and schedules were signed on August 21, 1995 and were filed September 13, 1995. No substantive amendment to the schedules was filed before the October 16, 1995 meeting of creditors. Neither the Gundersons nor Dull came to that meeting with proposed amendments to the schedules, either in oral or written form. During the meeting, Dull's comments indicate that she knew of the Helzberg ring and a watch, and believed they were the only items omitted from the schedule of personal property. See Exhibit 11, pages 6-7. Dull

testified at trial that she first learned of the existence of the other unscheduled assets at the meeting of creditors. Judging from the number and type of items omitted from the schedules, the court finds it more likely that Dull was not told of them.

Contrary to Gundersons' claim of disclosure to their attorney, the evidence shows that Dull was given misleading and incorrect answers to questions that, if answered truthfully, would have revealed the assets. Dull asked Julie at the initial interview if they had expensive jewelry. Julie told Dull only of a wedding ring worth $250.00 and another ring pledged to Helzberg. Exhibit D, page 2. The omission of the other items of jewelry does not seem inadvertent, considering the number of items and their large value. Julie knew the values they had assigned to the jewelry when they gave AVCO a security interest in the items. See Exhibits 3, 4. She had purchased the 2-carat diamond ring as a gift for her husband. Exhibit 11, page 18. Later in the interview, Julie told Dull that AVCO had security in a ring and a watch. Exhibit 12, pages 9-11. Dull noted the ring by the generic term "jewelry." Exhibit D, page 4. Dull believed the ring was the wedding ring previously disclosed, and assumed that the watch was not an expensive item. Exhibit 12, page 12. Julie testified at trial that, when she told Dull about the jewelry and watch, Dull said nothing. The evidence indicates that Julie did not tell Dull the value of the watch or the values of the other omitted items except the Helzberg ring. She left Dull with the impression that she and her husband had jewelry worth approximately $2,250, when they actually had items previously valued at a total of $19,785.

When asked about bank accounts, Julie Gunderson told Dull that they had two accounts, each with a balance less than $50. Julie claims she told Dull about the credit union account with a balance of approximately $25,000 and that Dull told her "not to worry" about it. Julie implied she believed the account need not be scheduled because it was overencumbered. Yet Gundersons did not question their listing of other overencumbered assets in Schedule B. See Exhibit 1. In the schedule of secured creditors, each creditor was listed as undersecured. Id., Schedule D. Julie did not claim that she thought those creditors' collateral should not have been listed. Moreover, it does not make sense that "not worrying" was a reason not to disclose the account when asked questions relating to the asset. On the contrary, if the Gundersons were not worried, it seems they would be more inclined to answer the questions directly and truthfully.

Julie said Dull's statement "not to worry" about the account came up in the context of her telling Dull about the debt to the credit union which was secured by the account. Earlier in her testimony, Julie made the more credible statement that Dull told her not to worry any more about creditors calling her. It is not believable that Dull would have forgotten about or advised omitting a $25,000 asset. The court finds that Julie did not tell her about the account.

Nor does the court find that Julie Gunderson told Dull in the initial interview about the saddles. This omission may have been inadvertent. The saddles were inventory in Marlin's business. However, Julie also told Dull at the interview that they were not engaged in business. Dull crossed out other questions related to businesses on her intake form. Exhibit D, pages 9-10. Although they were Marlin's businesses, the saddle and tack business and the counseling business were the Gundersons' only sources of earned income at the time of their bankruptcy filing. It seems odd that Julie would not have remembered them. Marlin considered both businesses active on the date of the bankruptcy petition. He gave as one reason for not attending the interview with Dull that he was on a trip to South Dakota to sell tack. Gundersons had their telephone account and two credit cards in the name of Amazing Grace Ministries. Exhibit A, Exhibit E (statements from American Express, Advanta).

Gundersons argue that Dull should have known about the omitted assets from other facts they disclosed. At the initial interview with Dull, Gundersons provided her with at least the first four pages

of the sheets that make up Exhibit E. Shortly thereafter they provided her with copies of their 1993 and 1994 income tax returns. Exhibits 9, 10. They did not provide her with a copy of the security agreement with AVCO. The tax returns revealed that in 1993 and 1994, Gundersons had income from a saddle and tack business and also had interest income of more than $1,000 each year. These facts are ambiguous as to Gundersons' financial situation on the date of their filing in 1995. The name of the interest payor, Lead Miners Federal Credit Union, does not match the names of financial institutions Gundersons listed for Dull. The sheets of expenses and creditors in Exhibit E included the item "Dakota Territory Fed. CU $280.30 $92.84 $70.84." Exhibit E, unnumbered page 3. The item does not identify these numbers as monthly or total figures; it is in a list with other items of both types. Neither the account balance at the credit union nor the total debt owed it appears in any of the documents Gundersons provided to Dull. There is no doubt that Dull could have been more thorough in questioning the Gundersons. However, the issue is not whether Dull could have eventually discovered the truth but whether the Gundersons themselves were truthful. The documents suggested a possibility of assets. Gundersons did not admit having them.

When Gundersons received the petition and schedules from Dull, they knew the documents contained errors. Gundersons claim they called Dull's office and tried to get her to make corrections. Marlin said he called once with additional information about credit cards, but does not claim he talked to anyone about adding assets. Julie was not sure when she first called Dull's office to report errors. She thought it had been before they signed the schedules, but said it could have been after signing. Gundersons submitted telephone records to show calls made to Dull's office. Exhibit A. The numbers called were either 712-252-1615 or 712-277-1352. Gundersons signed the schedules August 21, 1995. Assuming, as Marlin said, that they received the schedules just a few days earlier, Gundersons made the first call to Dull's office on August 22, the day after they signed the documents. They next called on September 13, shortly before the time the petition and schedules were filed, and again on October 16, the day of the meeting of creditors.

Gundersons refer to a time when they brought an error to Dull's attention. They say they were told to sign the signature page because the rest of the document could be corrected and reprinted later. Dull said this could not have happened with the original schedules, because the equipment her office used at that time would have required reprinting all pages. This incident occurred during preparation of the second amendment to the schedules in November, 1995, after the meeting of creditors. Exhibits B, C. The correction related to a checking account in the amount of approximately $430.00.

Julie said that after Dull told her not to worry about the $25,000 credit union account, she "never thought any more about it." She and Marlin did not talk about the fact that the account was not in the schedules, and she did not ask Dull to amend the schedules to list the account. Julie's testimony was vague about what she told Dull or Dull's office staff in regard to errors about the jewelry. Julie did not claim that she told anyone about particular items that were omitted. Marlin said he "didn't give it any thought" that the jewelry was not listed.

Gundersons signed their petition and schedules knowing they contained errors. Their explanation that they were pressed to sign them is not credible. No amendments to the schedule of assets were made prior to the meeting of creditors. Their explanations about attempts to have the schedules corrected were vague. The court finds that they did not attempt to correct the schedules to disclose the credit union account or the jewelry.

Gundersons contend they readily disclosed information at their meeting of creditors. This is not true as to the approximately $25,000 in share drafts at the credit union. Gundersons thought of their account as the equivalent of a bank savings account. Exhibit 11, page 13. Trustee Forker asked them

if they had cash on hand or money in bank accounts on the date of filing. Julie answered, "No." Marlin did not answer. Id. at 5. Forker's questioning then led to discovery of the jewelry. He later asked Gundersons, "To the best of your knowledge, other than jewelry, have you listed all your assets and all your liabilities on the schedules?" Julie answered, "Yes;" Marlin gave no response. Id. at 11. Later in the examination, Mark Buehler of AVCO asked if they had about $29,000 in a credit union. Gundersons then admitted the existence of the account. Id. at 12. Disclosure of an asset after the debtor realizes the trustee or a creditor has already discovered the existence of the asset creates only a slight inference of innocent intent. Montey Corp. v. Maletta (In re Maletta), 159 B.R. 108, 112 (Bankr. D. Conn. 1993); MacLeod v. Arcuri (In re Arcuri), 116 B.R. 873, 882 (Bankr. S.D. N.Y. 1990). The presence of the AVCO representative may have been a factor in Gundersons' disclosure of the jewelry. Prior to the meeting of creditors, Mark Buehler had faxed a copy of the security agreement to Forker. Particular items of jewelry were disclosed only after Forker began reading descriptions of the items from a list. Exhibit 11, pages 7-9. Gundersons disclosed the saddle and tack business and the inventory of saddles much later in the examination, after Forker asked them directly if they had any saddles. Id. at 19-20.

Marlin Gunderson's non-participation in his own case is troubling. He did not join his wife at the initial interview with attorney Dull. He said he did not examine the schedules as well as he should have before signing them. He said he relied on his attorney and his wife to attend to matters. Marlin Gunderson is an educated person. Moreover, he has previously been a debtor in bankruptcy. He knew he was required to vouch for the accuracy of the joint petition and schedules by declaration under penalty of perjury. He had personal knowledge of the omitted items. The credit union account was a joint account. Exhibit 7. He was involved in the purchase of most if not all of the jewelry items. The counseling business and saddle and tack business were his businesses.

Some of the omissions from the schedule of personal property may have been inadvertent. The saddles may have been overlooked, and although Gundersons did not tell Dull they had a Rolex brand watch, the omission of a "watch" and the ring secured to Helzberg was in error. However, because of the cumulative effect of the omission of numerous items, items of significant value, and information that would have revealed the assets, the court finds and concludes that Gundersons knowingly and fraudulently filed false schedules and made false statements at their meeting of creditors. Gundersons should be denied their discharges under 11 U.S.C. § 727(a)(4) for false oath.

The Trustee claims Gundersons should be denied their discharges for their conduct in connection with the cubic zirconia ring. The Trustee first claims that the Gundersons owned a 1.5 carat diamond ring on the date of filing, but turned over to him a cubic zirconia ring instead of the diamond. Complaint, Count III. The Trustee's alternate theory is that the ring was always a cubic zirconia ring, but that Gundersons falsely described the ring as a diamond ring in the security agreement with AVCO and then scheduled the ring as a diamond to cover up their fraud against AVCO. The court concludes that the Trustee did not prove a separate ground for denial of discharge in his claim relating to the cubic zirconia ring. There was no evidence of a switch of rings to support the Trustee's first theory. The ring was always a cubic zirconia ring.

Nor do the facts support the Trustee's alternate theory for denial of discharge. The amended schedules listing the cubic zirconia ring as a diamond contained a false statement. Gundersons both knew it was false. However, Gundersons would have had nothing to gain by listing the asset at higher than its actual value. The falsity does not create an inference of fraudulent intent under § 727(a)(4). The Trustee's theory may be that the listing of the cubic zirconia ring as a diamond ring was a concealment of property of the estate with intent to hinder, delay or defraud AVCO under § 727(a)(2). The false statement may have prevented AVCO from discovering a dischargeability action in time to file a

complaint. Under this theory, Gundersons concealed their past conduct toward one creditor. It seems the Trustee's alternate theory blurs the distinction between actions under § 523(a)(2) and § 727(a)(2). The most relevant fact relating to the cubic zirconia ring is its omission from the original schedule of personal property.

The Trustee claims as an additional ground for denial of the Gundersons' discharge that the omission of items from their schedule of personal property was an act of concealment under § 727(a)(2). A debtor is not entitled to a Chapter 7 discharge if "the debtor, with intent to hinder, delay, or defraud a creditor ... has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed ... property of the estate...." 11 U.S.C. § 727 (a)(2)(B). The Trustee must prove actual intent to hinder, delay or defraud a creditor. Intent may be shown by circumstantial evidence. Excelsior Truck Leasing Co., Inc. v. Bernat (In re Bernat), 57 B.R. 1009, 1012 (E.D. Pa. 1986). The property omitted from the schedules was property of the debtors which on the date of filing would have become property of the estate. Failure to disclose substantial assets on bankruptcy schedules has been held to constitute concealment for purposes of § 727(a)(2). See, e.g., Cobb v. Hadley (In re Hadley), 70 B.R. 51, 53-54 (Bankr. D. Kan. 1987); Rafoth v. Chimento (In re Chimento), 43 B.R. 401, 403-04 (Bankr. N.D. Ohio 1984). Omission of numerous items of substantial value creates an inference of fraudulent intent sufficient to deny debtors a discharge under § 727(a)(2). Hadley, 70 B.R. at 54; see also Chimento, 43 B.R. at 404 (only reasonable inference from omission of two diamond rings from schedules was that debtor had fraudulent intent to conceal them from creditors). The court finds and concludes that the Trustee has met his burden of proof on the claim under
§ 727(a)(2). The Gundersons omitted several valuable assets from their schedules and had no adequate explanation for their omission.

ORDER

IT IS ORDERED that judgment shall enter that the discharges of Marlin J. Gunderson and Julie D. Gunderson are denied under 11 U.S.C. § 727(a)(2) and 11 U.S.C. § 727(a)(4) for concealment of property of the estate and for false oath.

IT IS FURTHER ORDERED that Count V of the Trustee's complaint is dismissed, and that the balance of the complaint is overruled.

SO ORDERED THIS 9th DAY OF JUNE 1997.

William L. Edmonds
Chief Bankruptcy Judge

June 9, 1997

I certify that on I mailed a copy of this order and a judgment by U.S. mail to: Wil Forker, A. Frank Baron and U.S. Trustee.

1. Marlin Gunderson is also known as Jim Gunderson, M. Jim Gunderson, Rev. M. Gunderson, Rev. M. Jim Gunderson, and M.J. Gunderson. Exhibit E, statements from credit cards; Exhibit 7.