In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

DAVID JOSEPH BARBER
Debtor(s).

Bankruptcy No. 96-51623XS
Chapter 7

DONALD H. MOLSTAD Trustee
Plaintiff(s)

vs.

DAVID JOSEPH BARBER
Defendant(s)

Adversary No. 96-5206XS

Objection to Discharge

MEMORANDUM OF DECISION

Trustee Donald H. Molstad objects to debtor's discharge. Trial of the proceeding was held on December 3, 1997 in Sioux City. Molstad represented himself. David J. Barber, the debtor, was represented by Alice S. Horneber. This is a core proceeding.

I.

David Barber was injured in a motor vehicle accident in January 1994. He filed a lawsuit to recover for his injuries and settled the suit for $30,000.00 in January 1996. After payment of legal fees and expenses, he received $19,724.93. On January 13, 1996, he deposited that sum in his savings account at Siouxland Federal Credit Union.

When Barber filed his chapter 7 petition on June 28, 1996, none of the money was in the account. Barber had made the following withdrawals:

January 23, 1996 $ 4,775.00
January 29, 1996 $ 1,000.00
January 29, 1996 $13,500.00
February 3, 1996 $ 450.00

Barber testified that he used the money to pay living expenses and gambling debts.

Prior to January 1996, Barber gambled at the riverboat casino in Sioux City and at the casino in Sloan. At these locations, he had to place cash bets. He also bet on the outcome of football games. By late January 1996, he says he had lost $12,500.00 on football bets. When he filed bankruptcy, he scheduled $38,173 in unsecured debt.

The following narrative represents Barber's testimonial explanation of his football betting and his payment of his football gambling debt.

In late August 1995, Barber went to a bar in North Sioux City, South Dakota. A man was sitting at the bar

and by him were sheets of paper. Barber noticed the sheets, and he picked one up. He asked the man what they were for and he was told they were for betting on football games. A sheet contained upcoming weekend matchups of 35-40 games (presumably both college and pro games). Each game showed a point spread and for each game the bettor could wager some amount (there was no evidence of any limit). A bettor could bet on some or all of the games. Barber took a sheet home and indicated some wagers. He took it back to the bar on a later night and gave it to the man he had gotten it from. He told the man his name, but not his address or phone number. The man did not identify himself and Barber did not ask him to do so. Thereafter Barber wagered weekly using these sheets. He bet between $200 and $800 per week; sometimes he bet as much as $1,000. Barber lost the first time. He went to the bar and asked the unidentified man about paying his bet. He was told he could settle up at the end of the season. The unidentified man was not generally at the bar when Barber went, so he would pick up and drop off his sheets with a bartender.

Barber kept track of his bets on his newspapers. He would circle his picks and note the amount of his bet. He has thrown these papers away.

His losses grew and by January 1, 1996 he was behind $9,000.00. Even then he was not asked to pay up, but the unidentified man mentioned to him that he had a pretty big bill. He was permitted to continue wagering on credit. By the end of the season he owed $12,500.00. Although he had not given the man his telephone number, he was called at home twice by the man. Toward the end of the season he was told he needed to get his debt taken care of. He felt pressured. Barber withdrew $13,500.00 from his savings account, met the man at the Wooden Nickel in North Sioux City, and paid him $12,500.00.

Barber did not tell friends or relatives that he had been gambling on football games. He retained no records of his bets. He never learned the name of the man. After the objection to discharge was filed, he went back to the bar where he left his bets, but he did not see the man or recognize any bartender. Nor did he see any other familiar faces. There were no witnesses to his payment of the debt, and there is nothing to document it.

Barber's injuries from the motor vehicle collision were somewhat serious. He hurt his lower back. He had difficulty standing and raising his arms. He was treated by a doctor, a chiropractor, and a physical therapist. He was laid off and later fired from his job as an exterminator by his then-employer

Presto X. He was off work for about five months. He now works as a grain handler for Continental Grain Co. He says that after the accident, he became depressed and started drinking more and gambling. He said that he did not gamble that much before.

Barber has a girl friend named Heather McMahan. They have lived together on and off since December 1993. She testified that Barber's attitude toward everything "went downhill" after his injury. She said he was "crabby." She says he began acting suspiciously at the end of 1995, leaving the house without telling her and staying out late. She says that once or twice he got telephone calls and he indicated to her to leave the room so he could talk in private. Once she says she ran across a notebook that had football team information in it with dollar amounts and spreads. When she asked Barber about the notebook, she says he told her it was none of her business. He never mentioned such a book. He never told her he was gambling, and she did not know until he filed bankruptcy. She says she knew when he got the settlement money, but that he did not seem happy and that he did not appear to buy anything with the money.

II.

The trustee objects to debtor's discharge on the ground that Barber has failed to explain satisfactorily the loss of a significant amount of cash, specifically the proceeds of his settlement. He also contends that debtor has given a false statement as to the use of the money by saying that it was lost in gambling.

A debtor may be denied a discharge if "the debtor has failed to explain satisfactorily ... any loss of assets or deficiency of assets to meet the debtor's liabilities. 11 U.S.C. § 727(a)(5). The burden is on the trustee to prove his objection. Fed.R.Bankr.P. § 4005. The trustee must prove

> that the debtor at one time owned a substantial identifiable asset, not too remote in time to the date of the commencement of the case; that on the date of filing the voluntary petition the debtor no longer had the particular asset, and when called upon to explain its disposition, he was unable to furnish a satisfactory explanation.

Bernstein v. Carl Zeiss, Inc. (In re Bernstein), 78 B.R. 619, 622 (S.D. Fla. 1987). "[T]he debtor cannot prevail if he fails to offer credible evidence after the [objector] makes a *prima facie* case." First Texas Savings Association, Inc. v. Reed (Matter of Reed), 700 F.2d 986, 992 (5th Cir. 1983). The Code does not define what it means to explain a loss "satisfactorily." It is said that the explanation must convince the judge. Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 619 (11th Cir. 1984) (citing In re Shapiro & Ornish, 37 F.2d 403, 406 (N.D. Tex. 1929), *aff'd by*, Shapiro & Ornish v. Holliday, 37 F.2d 407 (5th Cir. 1930)). Vague or conclusory explanations are insufficient. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Simone (In re Simone), 68 B.R. 475, 479 (Bankr. W.D. Mo. 1983). One view is that "discharge will be denied where the debtor makes only a vague evidentiary showing that the missing assets involved have been used to pay unspecified creditors, or where the debtor fails to provide corroborative documentary evidence to confirm his explanation." Wortman v. Ridley (In re Ridley), 115 B.R. 731, 737-38 (Bankr. D. Mass. 1990).

It has oft been quoted that

> The word "satisfactorily" ... may mean reasonable, or it may mean that the court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation--he believes what the bankrupts say with reference to the disappearance or the shortage. He is satisfied. He no longer wonders. He is contented.

In re Shapiro & Ornish, 37 F.2d 403, 406 (N.D. Tex. 1929), *aff'd by,* Shapiro & Ornish v. Holliday, 37 F.2d 407 (5th Cir. 1930).

In particular, courts have required substantiation of gambling loss explanations. See Dignam v. McMahon (In re McMahon), 116 B.R. 857, 861 (Bankr. M.D. Fla. 1990) and cases cited therein. This is so because otherwise gambling might be merely a convenient way to explain the "loss" of assets that might actually be hidden away. Koppey v. Hirsch (In re Hirsch), 36 B.R. 643, 645 (Bankr. S.D. Fla. 1984); Indian Head National Bank v. Mitchell (In re Mitchell), 74 B.R. 457, 461 (Bankr. D. N.H. 1987).

In my view, substantiation does not always require documentation. I agree with the court in Mitchell that by itself lack of documentation of gambling losses ought not to require denial of discharge. Id., 74 B.R. at 461-62. As the court stated: "The issue always will come down to credibility of the debtor-witness in consideration of all the surrounding circumstances." Id. at 462 n.3.

III.

Whether an explanation is satisfactory depends on the totality of the circumstances and the nature of the explanation. I understand that in the area of illegal gambling, receipts will not be given. There may be little, if any, written documentation of gambling losses. But there may be some. For example, if one claims to lose a lot of money at a casino, perhaps one can furnish automated teller receipts from a location at or near the casino. Perhaps the debtor keeps records of winnings and losses. In this case, there was allegedly a notebook recording Barber's betting. It was not offered in evidence; it was only mentioned. Thus even what documentation there may have been, was not presented to the court.

Also, the quality of an explanation depends on the purpose for it. The debtor's fulfillment of his obligation to explain the loss allows the trustee and creditors to be sure that they have full access to information about his transactions, including potentially avoidable ones, and complete information about his assets and liabilities. If the explanation is satisfactory, creditors can be assured that assets are not being shielded. An explanation is not requested out of general, idle curiosity. The debtor is obligated to provide as much specificity as he can.

The trustee is entitled to more than just bare information on what was done with the money. He is entitled to information as to whom the money was given. It may be that the trustee is entitled to a return of the money under 11

U.S.C. § 548(a)(2) or perhaps

§ 544(b).

Details as to whom the money was given also can add credibility to the explanation. It is the lack of detail from the debtor as to whom he dealt with that is most disturbing. I find it incredible that Barber could provide no names. He went to the same bar each week for approximately five months. He provided a sheet of his bets to someone, a bartender or the bookmaker. But he says he never learned any names. When he went back after this action was filed, he says he recognized no one. My experience with human nature makes me doubt that one would go to a bar to bet over such an extended period and never ask the bookmaker or bartender his name or ask the bartender who the bookmaker was. Perhaps one would not inquire so bluntly, but one, in my view, would probably try to find out the full or partial identity of people dealt with regularly over such a time. I am asked to believe that the debtor became indebted for $12,500 to an unidentified man. Yet the debtor appears to accept that the man to whom he owed such a sum would make the effort to find him. I find the debtor's assertion that he could not identify anyone he dealt with as ultimately not believable. Given the debtor's alleged use of the money, some identification of the other parties to the transaction was necessary to make the debtor's explanation satisfactory.

I understand that if debtor's story is true, he may be motivated not to identify the bookmaker or anyone who might identify the bookmaker. This may stem from concern over his safety. Be that as it may, he makes a choice to withhold information at the risk of his discharge.

I note that I found nothing in debtor's demeanor as a witness that made me doubt this explanation. He seemed forthcoming, except on the matter of with whom he dealt.

As I doubt his testimony about knowing the identities of people with whom he dealt, his explanation is not satisfactory either because it is entirely not true or because it is not complete. But it is unsatisfactory nonetheless.

Whether a debtor's explanation is satisfactory is a finding of fact. I find that debtor has failed satisfactorily to explain the loss of the cash proceeds of his personal injury claim, particularly the $13,500 withdrawn from the bank on January 29, 1996. I conclude, therefore, that his discharge should be denied under 11 U.S.C. § 727(a)(5).

IT IS ORDERED that the discharge of David Joseph Barber is denied. Judgment shall enter accordingly.

SO ORDERED THIS DAY OF MARCH 1998.

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 Don Molstad, Alice Horneber and U.S. Trustee.