In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

HAROLD GLEN PRY SR. *Debtor(s).*	Bankruptcy No. 98-00648S Chapter 7
WIL L. FORKER Trustee *Plaintiff(s)* vs. HAROLD GLEN PRY SR. *Defendant(s)*	Adversary No. 98-9102S

DECISION

The trustee objects to debtor's discharge. Trial was held on February 26, 1999 in Sioux City. Wil L. Forker, the trustee, appeared on his own behalf; Steven R. Jensen appeared for Harold G. Pry, Sr., the debtor (PRY). This is a core proceeding under 28 U.S.C. § 157(b)(2)(J).

Facts

Harold G. Pry, Sr. is approximately 60 years old. He is married to Margaret Pry. They live in Hawarden. For about 29 years, Pry was a meat inspector for the United States Department of Agriculture. He was hurt on the job on March 3, 1993, and he has not worked for the USDA since then. After using up his accrued sick leave and vacation leave, Pry began receiving monthly payments from the U.S. Department of Labor on account of his work injury. At first, the payments were based on an estimate of 100 per cent disability. Later, it was determined that he was employable. His disability rating was changed to 15 per cent, and his monthly payments were reduced in amount.

In addition to the periodic payments on account of his injury, Pry anticipated receiving a lump sum award of approximately $25,000.00. He did not know exactly when the payment would be made or exactly how much it would be. He believed that the lump sum amount was determined taking into consideration the periodic payments. He testified that he thought the monthly payments could eventually eliminate the lump sum payment.

Pry describes the government payments as "workman's compensation."[(1)] His entire income for 1996 was from these payments. In 1997, he received the workman's compensation and also income from being a seasonal employee at Joe's Ready Mix.

During early 1998, Pry received workman's compensation and Iowa unemployment compensation. Payments from the federal and state governments on account of these benefit programs were deposited directly into Pry's account at Area Catholic Credit Union in Sioux City.

Pry has had an account at the credit union since 1984. The credit union holds a mortgage on Pry's home. To have borrowed from the credit union, Pry was required to be a member, and to qualify as a member, he had to have a savings account. Pry could withdraw from the account using automatic teller machines (ATMs); he could not write checks.

Pry filed his chapter 7 petition on March 6, 1998. He and his wife had been experiencing financial difficulties for a long time. He contemplated filing bankruptcy as early as 1994. That year he had a conversation with John F. DeHoogh, an attorney from Sheldon, who was representing Pry in a state court matter. He related to DeHoogh that he was expecting a workman's compensation payment from the U.S. government of as much as $25,000.00 and that he was concerned that his creditors may attach it. Pry testified that DeHoogh told him that if it was workman's compensation, it was exempt from his creditors.

Pry's testimony was contradictory as to whether he mentioned bankruptcy to DeHoogh; first he said he mentioned his possibly filing, then he said he did not talk about bankruptcy. Whichever it was, Pry testified that DeHoogh did not tell him that he did not have to list his workman's compensation lump sum benefit claim on his bankruptcy schedules. Nor did DeHoogh tell him the effect of bankruptcy on Pry.

Pry was unclear as to when he contacted attorney Jensen about filing bankruptcy. It was probably in January or February 1998. Pry apparently told Jensen of his concern about creditors levying on his bank account. Pry once had his bank account garnished by a creditor He said he was advised by Jensen not to keep more than $100.00 in any one bank account. Based on this advice, on March 13, after he filed his petition, Pry opened an account for his wife at the credit union. He said he directed the credit union to periodically transfer funds (about $100.00 monthly) from his account to his wife's account.

When Pry filed bankruptcy on March 6, 1998, he did not disclose in his schedules that he expected to receive a workman's compensation lump sum payment from the federal government. He did show workman's compensation payments as his source of income in Schedule "I" and as the source of his income for the preceding two years in his Statement of Affairs. Workman's compensation was shown as the source of the payment to his attorney in the attorney's statement filed with the petition.

Pry explained at trial that he believed he did not have to list his interest in a lump sum payment as an asset because he had been told by attorney DeHoogh that it could not be reached by his creditors. He said that because it was exempt, he did not believe he had to put it on his schedules. Nonetheless, Pry scheduled many other items of property which he claimed as exempt in his schedule "C" (Exhibit 1). Pry did not tell Jensen, his bankruptcy attorney, about the anticipated lump sum payment.

Nor did Pry disclose in his schedules the existence of his savings account at Area Catholic Credit Union, although he had been required to list his interest in any of the following: "[c]hecking, savings or other financial accounts ... or shares in ... credit unions." (Exhibit 1, Schedule B, item 2.) Pry's explanation for the omission of the savings account was that he did not consider it an account because it was not for his benefit; it was more in the nature of a liability. It was required and opened only as a place of deposit for his funds so that the credit union could automatically withdraw his monthly mortgage payments. He said he had disclosed the debt to the credit union. Notwithstanding these

assertions, Pry had used the account to conduct his financial affairs, withdrawing various amounts for his own use from ATMs.

On March 20, 1998, the U.S. Department of Labor deposited $8,727.16 directly into Pry's account at the credit union. This was the long-awaited lump sum payment. Pry said he learned about it that same day upon checking his account balance at an ATM. Of the amount deposited, $8,720.00 was transferred the same day to his wife's account at the credit union. Pry testified that this transfer was made in error by the credit union. This testimony is contradicted by his wife. She testified that they discussed the matter, and they decided to transfer the money because of their fear of creditor garnishment. Pry gave an altogether different reason for the transfer in his answers to interrogatories:

> [B]ecause of the bankruptcy, I did not want someone to think I had a bunch of money in an account I did not report, or that I had withdrawn a large sum of money as cash that I was suppose (sic) to report. For this reason, the workers' compensation funds were transferred.

Exhibit 3, answer to interrogatory no. 5.

The meeting of creditors in Pry's case was held April 13, 1998. At that time, Pry did not disclose that he had received the payment from the federal government. Moreover, he told the trustee that he did not have any money in a bank account. The trustee thought there might be an account with a financial institution, so he wrote to Pry's attorney on April 19, 1998, asking to have the "Debtor provide me with copies of this (sic) Bank Statements and cancelled checks for the months of December 1997, and January 1998 through March 1998." Pry discussed the request with attorney Jensen telling him that he had not had a bank account or checking account for about two years. This information was relayed by Jensen to the trustee. Pry testified that he considered that the request was for statements and canceled checks for any checking accounts, and he had none.

DISCUSSION AND CONCLUSIONS

The trustee objects to Pry's discharge on three grounds. He argues that Pry gave false oaths in the case by intentionally failing to disclose, in his schedules or his examination, the existence of the lump sum payment and the credit union account. Also, the trustee contends that Pry, with an intent to hinder, delay, or defraud his creditors or the trustee, concealed property of the estate by failing to disclose these assets. Last, the trustee argues that Pry's discharge should be denied because he withheld from the trustee financial records relating to the account at the credit union. The trustee must prove each element of an objection to discharge claim by a preponderance of the evidence. Montey Corp. v. Maletta (In re Maletta), 159 B.R. 108, 111 (Bankr. D. Conn. 1993).

False Oath -- § 727(a)(4)

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). To bar the debtor's discharge, the trustee must prove that: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the statement was made by the debtor with fraudulent intent; and (5) the statement related materially to the bankruptcy case. Beaubouef v. Beaubouef (Matter of Beaubouef), 966 F.2d 174, 178 (5th Cir. 1992).

Statement under Oath

The debtor has a duty to sign the schedules and statement of financial affairs under penalty of perjury. The debtor declares under such penalty that they are "true and correct." These declarations in the debtor's schedules and statement have "the force and effect of oaths." Golden Star Tire, Inc. v. Smith (In re Smith), 161 B.R. 989, 992 (Bankr. E.D. Ark. 1993). The debtor is examined under oath at the meeting of creditors. A claim of false oath may be based on statements made by a debtor in the schedules and statement of financial affairs or at the meeting of creditors. In re Maletta, 159 B.R. at 112.

Falsity

Pry failed to list the lump sum benefit claim and the credit union account in his schedules; nevertheless, he says his schedules were not false. Pry argues that neither the account nor the workman's compensation claim had to be listed because, as exempt assets, they were not property of the estate. He says that the lump sum benefit was not property of the estate because workman's compensation benefits are exempt under Iowa law. The credit union account was exempt, he says, because, at filing, it contained only workman's compensation benefits and unemployment compensation benefits, both of which are exempt under Iowa law.

Pry's argument is without merit. It ignores the legal effect of exemptions on property of the estate. All legal and equitable interests of the debtor become part of the bankruptcy estate upon the filing of a debtor's petition. 11 U.S.C. § 541(a)(1). A debtor may then exempt property from the estate. 11 U.S.C. § 522(b); Mertz v. Rott, 955 F.2d 596, 598 (8th Cir. 1992). It is incorrect that exempt property never becomes part of the estate and therefore need not be scheduled.

"Debtors have an unconditional duty to disclose all their property interests." Fokkena v. Tripp (In re Tripp), 224 B.R. 95, 100 (Bankr. N.D. Iowa 1998). Pry's argument ignores the requirement that he schedule all of his property. According to the directions on the schedules and forms, a debtor must list his or her property "of whatever kind." Official Form 6, Schedule B. Although appropriate alterations are permitted, the Official Forms must be observed and used. Fed.R.Bankr.P. 9009. The Official Forms must be construed to be consistent with the Bankruptcy Code. Id. The debtor has not pointed to any Code section, rule, or Official Form which permits a debtor to schedule only debtor's property which is property of the estate. His argument lacks any legal support. His omission of the assets made his schedules false.

Materiality

"The subject matter of a false oath is 'material,' and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property." Palatine National Bank of Palatine, Illinois v. Olson (In re Olson), 916 F.2d 481, 484 (8th Cir. 1990) (quoting Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 618 (11th Cir. 1984). Pry's omissions were material. The lump sum benefit turned out to be $8,727.16, a significant sum. The credit union account contained either $82.64 or $303.64 on the day of bankruptcy. The actual amount depends on the timing sequence of the bankruptcy filing and a direct deposit on the same day. But the account was material not so much for the amount in the account but for the importance of the account to the conduct of debtor's financial affairs. Pry used the account for the deposit of money assets, the payment of his mortgage note, and the withdrawal of money to pay his bills and expenses. The account bore a significant relationship to his personal transactions and his assets.

Pry may take the position that his omissions were not material because the assets in question were exempt from the estate. The parties did not identify with any specificity the law under which Pry would have been entitled to compensation for his on-the-job injury. Likely his claim arose under 5 U.S.C. §§ 8101 et seq. and particularly § 8135. Assuming it did, Pry's claim to the lump sum payment would have been exempt under 5 U.S.C. § 8130 and 11 U.S.C. § 522(b)(2)(A). Nonetheless, a debtor's discharge may be denied under 11 U.S.C. § 727(a)(4)(A) even where the undisclosed asset is exempt. Mertz v. Rott, 955 F.2d 596, 598 (8th Cir. 1992). Pry's nondisclosure was material even though the property was likely exempt, had the exemption been claimed.

Knowledge of Falsity and Fraudulent Intent

Pry knew that his schedules did not include his lump sum benefit claim or his credit union account. He intentionally did not list them. He denies that his schedules were knowingly false or that the omissions were made with a fraudulent intent. "An act is done fraudulently if done with intent to deceive or cheat any creditor, trustee or bankruptcy judge." Fokenna v. Tripp (In re Tripp), 224 B.R. 95, 98 (Bankr. N.D. Iowa 1998) (quoting United States v. Lerch), 996 F.2d 158, 161 (7th Cir. 1993)). 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 should not deny a debtor's discharge, however, if the untruth is a result of a mistake by the debtor. Bologna v. Cutignola (In re Cutignola), 87 B.R. 702, 706 (Bankr. M.D. Fla. 1988).

Pry's explanation for his failure to schedule the compensation claim was that he had been told the claim was exempt. He said that he believed, therefore, that it did not have to be listed in his schedules. He gives the same explanation for his failure to schedule the credit union account. He says the account was exempt because it contained only deposits on account of workman's compensation and unemployment compensation. He also says that he did not consider it an asset because the account was set up merely for the credit union's benefit in withdrawing funds to pay Pry's monthly mortgage payments.

In saying he did not know the schedules or his testimony were false and that he did not omit the assets with a fraudulent intent, he relies on advice of counsel. "Generally, a debtor who acts in reliance on the advice of his attorney lacks the intent required to deny him a discharge of his debts." First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1343 (9th Cir. 1986). But the reliance must be in good faith, id., and the reliance must be reasonable. Federal Land Bank of Omaha v. Ellingson (In re Ellingson), 63 B.R. 271, 276 (Bankr. N.D. Iowa 1986). Also, the advising counsel must have been fully aware of all relevant facts. Wendel v. Sharpe (In re Sharpe), 16 B.R. 226, 229 (Bankr. S.D. Fla. 1981).

In this case, the advice, if it was given, was not even on point. Pry admits that he was told by DeHoogh that the lump payment, if it was workman's compensation, was exempt from creditors. Pry was not told that if he filed bankruptcy, he did not have to disclose it because of the exemption. I question, therefore, whether "advice of counsel" is a pertinent argument. More likely, the advice is relevant because it relates to a contention that the assets were omitted as a result of mistakenly understanding the legal effect of DeHoogh's advice. But in this regard, I find Pry's explanation not credible. I do not believe his testimony that he omitted the assets because he believed them to be exempt. He admittedly scheduled numerous other assets that he claimed as exempt. If his great concern was with the exemption of the payment, one would think he would be concerned with scheduling the asset and making sure it was listed on Schedule "C," the claims of exemption.

I also find it questionable that in 1994 he would be sufficiently concerned about creditors attaching the lump sum payment that he would discuss it with DeHoogh, but when he filed bankruptcy, he did not discuss it with his bankruptcy attorney, even if only to verify DeHoogh's previous advice. Instead, he asks the court to believe that DeHoogh's exemption advice prompted him to conclude that exempt assets do not have to be scheduled, even though at the time his bankruptcy attorney was preparing schedules which included assets claimed as exempt.

Pry was not a credible witness. As an example, his testimony on the transfer of the lump sum payment from his account to his wife's varied significantly from her testimony. She was more credible. His testimony varied also from his answers to interrogatories. His answers and demeanor at trial gave the impression of a witness who gave answers based on his perception of what responses were in his best interest. For these reasons, I do not believe Pry's testimony that he failed to schedule the assets because he believed they were exempt and not property of the estate. I believe it is more likely that he was sufficiently concerned about his creditors taking the benefit payment that he intentionally did not disclose it to his attorney and intentionally omitted it from his schedules. I think it likely that he did not disclose the claim to his bankruptcy attorney because he did not want to take the risk that he might have to disclose the asset in the bankruptcy and because he feared he might lose it in bankruptcy notwithstanding DeHoogh's advice. He admittedly feared that even though it was exempt, creditors could still attach it and he might not be able to get the property back. Pry's concealment of the lump sum benefit was furthered by his false testimony at the meeting of creditors.

I find that Pry knowingly and fraudulently failed to disclose the workman's compensation lump sum benefit claim in his schedules and also knowingly failed to disclose the payment of it in his examination at the meeting of creditors. I find also that he knowingly and fraudulently failed to disclose the existence of his credit union account to the trustee. I do not find credible his explanation that he did not consider it an asset because it was for the credit union's benefit, not his. That explanation is contrary to the evidence. He used the account to conduct his personal transactions. Like the omission of the benefit claim, I believe the omission was motivated by Pry's fear that his creditors could reach the account. I conclude that Pry's discharge should be denied under 11 U.S.C. § 727(a)(4)(A).

The Trustee's Other Claims

The trustee contends that Pry should be denied a discharge under 11 U.S.C. § 727(a)(2) because he concealed the benefits claim and the credit union account which were properties of the estate.

There is a dispute among courts as to whether a debtor can be denied discharge under 11 U.S.C. § 727(a)(2) if the property transferred would have been exempt. See Lee Supply Corp. v. Agnew (Matter of Agnew), 818 F.2d 1284, 1290 (7th Cir. 1987)(to deny discharge under § 727(a)(2), it must be shown that there was a transfer of valuable property which reduced assets available to creditors); see alsoDiscenza v. MacDonald (In re MacDonald), 50 B.R. 255, 259 (Bankr. D. Mass. 1985)(same); contraBernard v. Sheaffer (In re Bernard), 96 F.3d 1279, 1282 (9th Cir. 1996)(depletion of assets is not required to deny discharge under § 727(a)(2)).

Having decided to deny the debtor's discharge under 11 U.S.C. § 727(a)(4), I decline to decide this issue. I also will not decide whether under Count III of the complaint, the debtor's discharge should be denied for withholding from the trustee records of his account at the credit union.

IT IS ORDERED that Count II of the trustee's objection to debtor's discharge is sustained. Debtor's discharge is denied under 11 U.S.C. § 727(a)(4). Judgment shall enter accordingly.

SO ORDERED THIS 28th DAY OF APRIL 1999.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed by U.S. mail or provided a copy of this order and a judgment to Wil Forker, Steven Jensen, and U.S. trustee.

1. "Workers' Compensation" is the title to Chapter 85 of the Iowa Code (1997). As a federal employee, it is likely that the benefits to which Pry had a claim were those arising under Chapter 81, Title 5 of the United States Code, Compensation for Work Injuries, §§ 8101 et seq. Because the parties referred to the benefits or payments as "workman's compensation," they will be referred to as such in this decision.