In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

ANGELINA MECH *Debtor(s).*	Bankruptcy No. 97-01182S Chapter 7
WIL L. FORKER Trustee *Plaintiff(s)* vs. ANGELINA MECH *Defendant(s)*	Adversary No. 97-9157S

COMPLAINT OBJECTING TO DISCHARGE

The matter before the court is the trustee's complaint to deny the debtor's discharge under 11 U.S.C. §§ 727(a)(2) and (a)(4) for failure to disclose an interest in a property settlement. Final trial was held January 22, 1999 in Sioux City. Trustee Wil L. Forker appeared on his own behalf. Debtor Angelina Mech[(1)] was represented by John Moeller. This is a core proceeding under 28 U.S.C. § 157(b)(2)(J).

Findings of Fact

Angelina Mech filed her Chapter 7 bankruptcy petition on August 22, 1997. Exhibit 1. She is the former spouse of William Mech. William and Angelina were married in 1980. They had seven children. Angelina is 41 years old. She has a high school diploma and one year of beauty school. She works as a cake decorator at a supermarket. She has also worked out of her home as a hair stylist. William will soon be 43 years old. He is employed by the City of Sioux City as an electrician. Exhibit 2 at 2. He has worked for the city since 1975.

In 1991, Angelina filed a petition for dissolution of marriage in the Iowa District Court for Woodbury County. The matter proceeded to trial on several issues, including child support, visitation rights, division of property, and division of debts.

Angelina initially hired attorney Andrew Orr to represent her in the dissolution. Orr withdrew from the case shortly before trial. Attorney Gregory Lohr represented Angelina in the trial of the dissolution and the appeal of the decree.

Lohr helped prepare the pretrial stipulation of issues remaining for trial. According to Lohr, the parties attached to the stipulation a list of their assets and estimated values. It was agreed that Angelina would remain in the homestead. She valued the property at $35,000; William valued it at

$38,000. William has an interest in an account with the Iowa Public Employees' Retirement System (IPERS). Counsel for the parties used information from IPERS to value the asset. William stated it was worth $19,010.22, based on his own contributions to the account. Angelina valued the IPERS interest at $45,156.76. Her estimate was based on contributions made by both William and his employer, the City of Sioux City. The home and the IPERS interest were the largest items on the list of assets.

The marriage was dissolved November 7, 1991. Exhibit 2 at 2. Angelina did not believe the economic provisions of the decree were favorable for her. She appealed. The issues on appeal included the calculation of child support and the division of property. The Iowa Court of Appeals filed its decision September 2, 1993. Exhibit 2. The trial court had calculated child support on a per child basis so that William's support obligation would be reduced as each child reached the age of majority. Id. at 4. The appellate court modified the decree and ordered William to pay child support based on a percentage of his income. Id. at 5. Angelina said the effect of the modification was that the monthly child support payment would not decrease until the fourth child had left home.

The appellate court also modified the division of property. The trial court had awarded William his entire IPERS account, which included $13,000 of contributions William himself had made to the account during the marriage. Id. at 6-7. Angelina received the home, subject to a mortgage of about $29,200. Id. at 6. The trial court ordered William to pay Angelina $1,500 in installments of $100 to equalize the division of property. Id. at 3, 6. The appellate court determined that the award was inequitable and ordered William to pay Angelina a share of his IPERS benefits when he retires. The court stated:

> We modify the decree to provide when and if Will commences to receive his IPERS benefits he shall pay to Angie an amount equal to fifty percent of a fraction of his benefits; the numerator of the fraction being eleven years, the number of years the couple was married, and the denominator of the fraction being the total number of years during which benefits were accumulated prior to being paid.

Id. at 7. Angelina received a copy of the appellate court ruling and discussed it with Lohr. He estimated that her share of the IPERS benefits would amount to perhaps $100 per month for some uncertain time, and that the payments might not start until 20-30 years in the future.

In about 1995, Mech first thought about filing for bankruptcy relief. At that time, she returned to attorney Orr for legal counsel and had a brief discussion with him. Sometime in 1996, she decided she would file a bankruptcy petition. She filled out a questionnaire given to her by Orr. She completed the questionnaire forms a couple of times because the papers were mislaid. Although Orr's office prepared her petition and schedules in 1996, Mech did not decide to file them until about a year later. She signed the documents sometime in April 1997. Exhibit 1.

Mech listed her homestead on her schedule of real property. Exhibit 1, Schedule A. She scheduled the following personal property:

Home furnishings	$ 500
Family photos	20
Clothing	200

Child support	0
1990 Chevy Celebrity	6,000
Wages	200

Id., Schedule B. Her Schedule I showed support income of $905 per month. She did not schedule her interest in the award of a share of her former husband's IPERS benefits.

Mech had two secured creditors, claims secured by the homestead and the car. She listed an Iowa agency as a priority creditor. She scheduled general unsecured creditors with claims totaling approximately $24,000. One was attorney Lohr's claim in the amount of $11,752.43 for fees for his work in her dissolution case.

At Mech's meeting of creditors, the trustee asked her whether she had received a property settlement in her dissolution. She said, "Just the house, the kids and the bills." When the trustee asked whether she had been awarded a portion of her former husband's IPERS benefits, she admitted that she had.

Discussion

The trustee alleges that Mech's discharge should be denied under 11 U.S.C. § 727(a)(2), because her failure to disclose her interest in the property settlement was an effort to hinder, delay or defraud creditors and to conceal the asset. The trustee alleges further that Mech's failure to disclose the asset either in her schedules or in response to his initial inquiries at the meeting of creditors constitutes a false oath for which her discharge should be denied under 11 U.S.C. § 727(a)(4). 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).

§727(a)(4) False Oath

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). The debtor has a 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." 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.

A debtor has an obligation to tell the truth. "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." Britton Motor Service, Inc. v. Krich (In re Krich), 97 B.R. 919, 924 (Bankr. N.D. Ill. 1988). 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).

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 v. Moorefield (In re Chalik), 748 F.2d 616, 618 (11th Cir. 1984).

Mech's schedules were false because of her failure to list her interest in the property settlement. The omission was material. The failure to schedule assets hinders the trustee's investigation into the debtor's financial affairs, including the availability of property for creditors. The issue in this case is whether Mech made the false statement knowingly and fraudulently.

Mech's defense is, essentially, that she forgot about the asset and was not reminded of it again until her meeting of creditors, when the trustee asked about the IPERS benefits. The trustee argues this explanation is not believable in light of the significant value of the asset and the importance of the IPERS issue in the dissolution proceedings. 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 or inadvertence by the debtor. Bologna v. Cutignola (In re Cutignola), 87 B.R. 702, 706 (Bankr. M.D. Fla. 1988).

The court first finds that Mech understood the property settlement sufficiently to know that it was an interest in personal property. She knew she had a right to receive payments in the future. She might have classified her interest as a property settlement or perhaps an interest in a retirement plan.

The court finds it credible, however, that Mech could have forgotten about the property settlement, considering the circumstances of the award and her view of the asset. Attorney Orr at first led Mech to believe she was not entitled to a share of the IPERS account because Mech's husband had an interest in the asset prior to the marriage. It is not clear whether at trial the issue of property division was characterized as a dispute over division of the IPERS account. Attorney Lohr could not recall how the issue of the IPERS account was presented to the trial court. Notwithstanding the significant value ascribed to the asset for purposes of pretrial, the trial court did not award Mech any share of the account. The court instead gave her judgment for $1,500 to equalize the division of property. Mech did not receive a property settlement based upon a share of the IPERS benefits until the decision issued by the court of appeals. The division of property was not the only contested issue in the dissolution; others were child support, visitation and division of debts. Unlike the award of child support, which likely had immediate importance to Mech and her children, the appellate court's division of assets had uncertain meaning for her. Attorney Lohr estimated what her future payments might be, but told her "not to count on it." Mech believed her share of the benefits would be in the range of $100 per month. The exact amount of the payments, when they would begin, and how long they would last could not be determined. The formula used to calculate the payments depended on when her former husband retired and how much he contributed to the plan. Mech said she viewed the payments as a relatively small amount that would likely not come due for another 20 to 30 years. Moreover, Mech said she was not counting on her husband complying with the order, based on her judgment of his past behavior. The appellate court ruling did not make her share of the benefits payable directly from IPERS. Mech would have to collect it from her former husband.

Mech's low estimate of the value of the asset is not determinative of the materiality of the matter. In re Olson, 916 F.2d at 484. However, the value of an omitted item may affect the inference to be drawn from its omission. 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). Where matters or property omitted are of a trivial nature or of negligible value, however, it becomes more likely that the items could have been omitted by mistake or through inadvertence.

In trial of this matter, no one attempted to prove the actual value of Mech's interest in the IPERS benefits. In view of her dissolution attorney's estimation of the payments and when they might

commence, the uncertainty of the formula for calculating her share of the benefit, and her opinion that collection would not be easy, the court is persuaded that Mech's estimate of the value of the asset was quite low. Considering her perception of the asset's worth, the existence of other important issues, such as child support, in the dissolution proceedings, and the span of years between the appellate court award and the preparation of her schedules, the court finds it credible that she could have forgotten about it.

No other circumstances strongly contradict this finding. The interest in the property settlement was the only item omitted from the schedules. There was no evidence that Mech omitted other information in an effort to prevent its discovery. She disclosed the related items of child support and Lohr's claim for attorney fees. The items likely aided the trustee's discovery of the property settlement. Because support was a major source of income and Lohr's claim was her largest unsecured claim, Mech had independent motives for scheduling the items. Nevertheless, the items were disclosed.

The court finds and concludes that the trustee has failed to prove by a preponderance that Mech omitted her interest in the property settlement with fraudulent intent. The trustee's claim of false oath should be dismissed.

§727(a)(2) Fraudulent Concealment

The trustee claims as an additional ground for denial of Mech's discharge that the omission of the property settlement from her schedule of personal property was an act of concealment under § 727(a)(2). A debtor is not entitled to a Chapter 7 discharge if

> (2) the debtor, with intent to hinder, delay, or defraud a creditor ... has transferred, removed, destroyed, mutilated, or concealed ...
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition.

11 U.S.C. § 727(a)(2). 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). 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); Butler v. Ingle (In re Ingle), 70 B.R. 979, 983-84 (Bankr. E.D.N.C. 1987); Rafoth v. Chimento (In re Chimento), 43 B.R. 401, 403-04 (Bankr. N.D. Ohio 1984); see also 6 Collier on Bankruptcy ¶ 727.02[6][b] (15th ed. rev. 1998) (same).

The court has already determined that the evidence is insufficient to show fraudulent intent in the omission of the property settlement from the schedules. A claim of concealment by omission under § 727(a)(2) would depend upon the same circumstantial evidence for proof of actual fraud. See In re Ingle, 70 B.R. at 983-84 (analyzing fraudulent concealment and false oath claims together). Accordingly, for the reasons discussed above in connection with the trustee's claim for false oath, the court concludes that the trustee has not met his burden of proof that Mech's omission of the asset was an act of fraudulent concealment or an act to hinder or delay.

IT IS ORDERED that the Trustee's complaint to deny Angelina Mech's discharge is dismissed.

SO ORDERED THIS 2nd DAY OF MARCH 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, John Moeller and U.S. trustee.

1. The debtor stated she has remarried, and her married name is now Schmidt. Because counsel addressed her as Angelina Mech throughout the trial, the court will also use that name to avoid confusion.