

March 26, 2002

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE LUCIUS CHRISTOPHER
TIREY, III, also known as L. C. Tirey,
III, also known as Chris Tirey,

Debtor.

BAP No. EO-01-025

LEON SLOAN and VIRGINIA
SLOAN,

Plaintiffs - Appellees,

v.

LUCIUS CHRISTOPHER TIREY, III,

Defendant - Appellant.

Bankr. No. 00-70913
Adv. No. 00-7077
Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Eastern District of Oklahoma

Before McFEELEY, Chief Judge, PUSATERI, and CLARK, Bankruptcy Judges.

PUSATERI, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Defendant-debtor Lucius Christopher Tirey, III (“Tirey”), appeals the bankruptcy court’s order denying him a discharge pursuant to 11 U.S.C.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

§ 727(a)(7) for having made a false oath in connection with the separate case of an insider, a corporation of which he was the president. Previously, this court remanded the case for the bankruptcy court to state additional findings of fact and conclusions of law. If the bankruptcy court did not modify its judgment, the parties could restore the case to our jurisdiction by submitting a letter to our Clerk. We declared that the judgment was vacated, but this part of our decision would actually take effect only if the bankruptcy court modified its judgment. The bankruptcy court has now supplemented its findings and conclusions without modifying its judgment, and the parties have restored the case to our jurisdiction in the manner provided by our prior decision.

The background of this appeal was stated in detail in our prior decision, and will not be repeated here. The false oath Tirey was alleged to have made was to sign bankruptcy schedules for the corporation that omitted assets owned by the corporation, most notably an antique beer truck and a flatbed trailer. The bankruptcy court had concluded in its initial ruling that the omissions were material, the beer truck because it was unencumbered so its full value would have been available for creditors, and the flatbed trailer because it was a large asset.

In supplementing that decision after we remanded the case, the bankruptcy court explained that it did not believe Tirey's testimony asserting that these omissions were not knowing and fraudulent, but merely inadvertent. The court pointed out that when the corporation's bankruptcy case was filed, there was no lien on the beer truck, and that by the time of the dischargeability hearing in March 2001, Tirey had been making monthly payments since at least September 1999 (the month after the corporation filed for bankruptcy) on a storage unit where the truck was housed. The court said that Tirey had also had insurance on the truck at some point, although at the hearing, Tirey could not remember whether the insurance remained in effect after September 1999. Finally, the court

stated that the flatbed trailer was a large and cumbersome asset that would be difficult to forget to list on the schedules. Consequently, the court concluded that Tirey knowingly and fraudulently made a false oath as to a material fact in the corporation's bankruptcy case, and denied his discharge pursuant to 11 U.S.C. § 727(a)(7).

DISCUSSION

The bankruptcy court based its judgment on § 727(a)(4), which provides that a debtor's discharge should be denied if "the debtor knowingly and fraudulently, in or in connection with the case—(A) made a false oath or account," and § 727(a)(7), which makes a violation of § 727(a)(4) that the debtor committed in connection with an insider's case a basis for denying the debtor's discharge in his own case. Federal Rule of Civil Procedure 52(a), made applicable to bankruptcy adversary proceedings by Federal Rule of Bankruptcy Procedure 7052, provides in pertinent part that when an action is tried to the court, "the court shall find the facts specially and state separately its conclusions of law thereon," and that the court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a). "A finding of fact is clearly erroneous only if the court has 'the definite and firm conviction that a mistake has been committed.'" *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). *Gillman v. Scientific Research Prods., Inc. (In re Mama D'Angelo, Inc.)*, 55 F.3d 552, 555 (10th Cir. 1995).

Furthermore, the Supreme Court has explained:

When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. See *Wainwright v. Witt*, 469 U.S. 412 (1985). This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than

demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. *See, e.g., United States v. United States Gypsum Co.*, *supra*, 333 U.S. at 396.

Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

In his attack on the bankruptcy court's supplemental judgment, Tirey first complains that the court ignored evidence that supported his defense that the omissions resulted from inadvertence and oversight. He is correct that there was evidence to support the defense, but an appellate court's role is not to determine whether it would have ruled the same way as the trial court, but whether the trial court's conclusion was "clearly erroneous." Here, the bankruptcy court's rejection of the defense is supported by the facts and permissible inferences that the court recited in its judgment, together with the court's opportunity to hear Tirey's testimony and observe his demeanor. Considering the evidence presented before the bankruptcy court, we do not have "the definite and firm conviction that a mistake has been committed," and consequently, must uphold the court's rejection of Tirey's defense of inadvertence and oversight.

Tirey next contends that the bankruptcy court's finding that the omissions were material was clearly erroneous. This is so, he says, because the omitted assets were subject to a lien in favor of plaintiffs Leon and Virginia Sloan ("the Sloans") that far exceeded the value of the assets, so the creditors would have received nothing more if the assets had been disclosed. However, the test for the materiality of an omission from bankruptcy schedules is not whether the undisclosed assets would have provided some value for creditors. *Job v. Calder (In re Calder)*, 907 F.2d 953, 955-56 (10th Cir. 1990); *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178-79 (5th Cir. 1992); *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 618 (11th Cir. 1984). Instead, as the Tenth Circuit

explained in *Calder*:

We agree with the bankruptcy court that each of [the debtor's] omissions was a material matter that would support denial of discharge. The omitted information concerned the existence and disposition of [the debtor's] property. See *In re Chalik*, 748 F.2d 616, 618 (11th Cir.1984) ("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."). [The debtor] has argued that he should not be denied a discharge of his debts because the undisclosed bank accounts and mineral interest were worthless assets. However, a "recalcitrant debtor may not escape a section 727(a)(4)(A) denial of discharge by asserting that the admittedly omitted . . . information concerned a worthless business relationship or holding; such a defense is specious." *Id.*

907 F.2d at 955. As the *Chalik* court pointed out, "Creditors are entitled to judge for themselves what will benefit, and what will prejudice, them. *Morris Plan Industrial Bank v. Finn*, 149 F.2d 591, 592 (2d Cir.1945)." 748 F.2d at 618. The value of the truck and trailer for creditors is not a basis for concluding that the bankruptcy court's finding of materiality was clearly erroneous.

Even if the value of the omitted assets were relevant, it appears that at least the truck did have value for the creditors at the relevant time. The bankruptcy court found that the truck was unencumbered when the corporation filed for bankruptcy; for purposes of the Sloans' dischargeability complaint, that is the time that matters. Tirey does not seem to suggest that the bankruptcy court's finding that no lien existed at the time the corporation filed for bankruptcy is clearly erroneous. If he were, we would simply point out that at trial, the trustee for the corporation's bankruptcy case indicated the lien on the truck did not exist when the case was commenced, but arose only during the chapter 11 phase of the case. This testimony supports the bankruptcy court's finding, and would be sufficient to defeat such an argument. Consequently, even if an argument that an omitted asset would have provided no value to creditors could negate a false oath claim, the argument would fail in this case. The fact the truck may have been

fully encumbered by the time of the trial on the Sloans' complaint is not at all relevant to the bankruptcy court's finding that the truck's omission from the corporation's bankruptcy schedules when the case was filed was material.

Conclusion

The bankruptcy court's supplemental judgment is affirmed.