

August 24, 2001

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NOT FOR PUBLICATION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 KRIEGER, Bankruptcy
Judges.

PUSATERI, Bankruptcy Judge.

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; 10th Cir. BAP L.R. 8012-1(a). 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 has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

§ 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. This court has reviewed the record and concludes that the judgment should be vacated and the case remanded for the bankruptcy court to state additional findings of fact and conclusions of law.

BACKGROUND

Tirey Distributing Company (“the Corporation”) filed a chapter 11 bankruptcy proceeding in August 1999. As president of the Corporation, Tirey signed its petition, schedules, and statement of financial affairs under oath. At that time, the Corporation was operating a greenhouse. The Corporation had owned a beer distributing business sometime before buying the greenhouse from Leon and Virginia Sloan (“the Sloans”). The Sloans provided most of the financing for the Corporation’s purchase, taking most or all of the Corporation’s assets as collateral. Apparently, the Sloans are owed just over \$1,000,000. Tirey testified that the Corporation had assets worth about \$700,000 when it filed for bankruptcy.

Various items owned by the Corporation were not listed in its schedules, most significantly a flatbed trailer and an antique truck, both of which had a beer company’s logo painted on them. The Sloans knew of the existence of all the omitted items before the Corporation filed for bankruptcy. The flatbed trailer was apparently on the greenhouse premises until near Christmas 1999, when Tirey told one of the Sloans he was going to use it for an errand and return it; he did not return it and later testified in a deposition that the trailer was at a relative’s house. Tirey kept the antique truck along with some personal items in a storage unit on which he paid monthly rent. The Corporation’s schedules were never amended to add the omitted items. The value of the omitted items was small compared to the total assets available to the Corporation’s creditors and to the amount of the

Sloans' claim.

The Corporation's case was later converted to chapter 7, and a trustee was appointed. At the initial meeting of creditors held soon after the Corporation filed for bankruptcy, at an examination held pursuant to Federal Rule of Bankruptcy Procedure 2004, and at the subsequent meeting of creditors held soon after the case was converted, Tirey testified that the Corporation's schedules were true and correct, even though they did not include the omitted items.

Tirey apparently guaranteed the Corporation's debt to the Sloans, and he filed his own chapter 7 bankruptcy case in April 2000. At the creditors meeting held in this case, the existence of the omitted items was finally revealed. The trustee for Tirey's personal case informed the trustee for the Corporation's case of the items. The Corporation's trustee then asked that the Corporation's schedules be amended to list the items, but this was never done.

Pursuant to 11 U.S.C. § 727(a), the Sloans objected to Tirey's discharge. At the ensuing bench trial, Tirey testified that his failure to list the items in the Corporation's schedules had been inadvertent. The bankruptcy court ruled that Tirey had made a false oath by omitting the assets from the Corporation's schedules, in violation of § 727(a)(4) and (7).

The bankruptcy court's order contains a section labeled "Findings of Fact," in which the court recited the testimony of the Corporation's chapter 7 trustee, one of the Sloans, and Tirey, along with various stipulated or otherwise uncontested facts. The court did not indicate whether it believed or disbelieved any of the testimony it mentioned, or what inferences it drew from the testimony. Then, in part of the section labeled "Conclusions of Law," the court reviewed the law applicable to a false oath claim under § 727(a)(4), and ultimately said:

It is the Court's duty to determine the credibility of the witnesses and the evidence with respect to the Debtor's intent to make a false oath or account. *Holaday v. Seay (In re Seay)*, 215 B.R. 780, 789 (10th Cir. BAP 1997). An honest error or mere inaccuracy

is not a basis for denial of the discharge. [*In re* Brown, [108 F.3d 1290,] 1295 [(10th Cir. 1997)] (citing *In re Meagnuson*, 113 B.R. 55, 59 (Bankr. D.N.D. 1989)).

The Court concludes that because the false oaths and the Debtor's failure to amend the corporate bankruptcy schedules were not made "in or in connection with th[is] case", a denial of the Debtor's discharge is not warranted.

Opinion at 7, *in* Appellant's Amended Appendix at 18. Later, turning to § 727(a)(7), the court said:

Section 727(a)(7) incorporates §§ 727(a)(2) and (a)(4) as they relate to Debtor's actions in a related case. In the [Corporation's] case, the Debtor made a false oath pursuant to §727(a)(4) when he did not list the flatbed trailer, the Antique Beer Truck and other personal property. The issue then becomes whether the omission was material. By the Debtor's own testimony, at the time this [sic] bankruptcy was filed, there was no lien on the Antique Beer Truck. This asset would have been available for creditors. Furthermore, the flatbed trailer is a large asset. The other items of personal property are relatively minor in value; however, the Debtor does have a duty to provide accurate information. The omission of the Antique Beer Truck and flatbed trailer was material. As a result, the Court finds that the Debtor's discharge should be denied pursuant to §727(a)(7).

Id. at 9, *in* Appellant's Amended Appendix at 20. Nothing else in the opinion concerns the court's conclusion that Tirey made a knowing and false oath in connection with the Corporation's case by omitting the flatbed trailer and antique truck from the Corporation's schedules.

DISCUSSION

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." Fed. R. Civ. P. 52(a). The Tenth Circuit has said:

This rule serves to (1) engender care on the part of trial judges in ascertaining the facts; and (2) make possible meaningful appellate review. *Ramey Constr. Co., Inc. v. Apache Tribe*, 616 F.2d 464, 466-67 (10th Cir. 1980). Thus, the touchstone for whether findings of fact satisfy Rule 52(a) is whether they are "sufficient to indicate the

factual basis for the court’s general conclusion as to ultimate facts” so as to facilitate a “meaningful review” of the issues presented. *Otero v. Mesa County Valley Sch. Dist.*, 568 F.2d 1312, 1316 (10th Cir. 1977). If a district court fails to meet this standard—i.e., making only general, conclusory or inexact findings—we must vacate the judgment and remand the case for proper findings. *Battle v. Anderson*, 788 F.2d 1421, 1425 (10th Cir. 1986).

Joseph A. ex rel. Wolfe v. New Mexico Dep’t. of Human Servs., 69 F.3d 1081, 1087 (10th Cir. 1995) (Footnote omitted); *see also Commissioner v. Duberstein*, 363 U.S. 278, 292-93 (1960) (conclusory, general findings did not comply with Rule 52; case remanded for new and adequate findings). The bankruptcy court based its judgment here 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,” 11 U.S.C. § 727(a)(4), 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. While we must affirm the bankruptcy court’s findings if they are not clearly erroneous, the court’s failure to satisfy Rule 52(a) prevents us from applying this standard of review.

In particular, we note that the bankruptcy court did not express findings and conclusions that supported its rejection of Tirey’s defense that the omissions resulted from inadvertence and oversight. In discussing the Sloans’ claim of a false oath in Tirey’s personal case, the court correctly stated that Tirey’s alleged false oath had to be knowingly and fraudulently made and that an honest error or mere inaccuracy is not enough to satisfy § 727(a)(4). The court rejected the claim under that provision, though, because the omission of assets from the schedules had not been made in that case. When the court turned to the question whether Tirey had made a sanctionable false oath in the Corporation’s case, the court said nothing about Tirey’s intent in omitting the items and his defense of inadvertence and oversight. Instead, the court stated its conclusion that Tirey had made a false

oath in that case and then turned to the question whether the omissions were material. While there was evidence to support a conclusion that Tirey had knowingly and fraudulently omitted the items from the Corporation's schedules, there was also evidence to support his defense of honest error.

We are also uncertain about the significance of the bankruptcy court's mention in its discussion of the claim of a false oath in Tirey's own case of the failure to amend the Corporation's schedules after the trustee for the Corporation's estate had already learned about the assets. It seems to suggest that the court might have relied on that failure in reaching its conclusion under § 727(a)(7). However, once the cat was out of the bag, so to speak, we do not believe that failing to amend the schedules to list no-longer-hidden assets can indicate that the original omission was knowing and fraudulent. Any possible fraudulent scheme had been exposed and was over at that point, and it could not be kept alive or furthered by not amending the schedules.

Because to do so would in effect constitute a trial *de novo*, the function of appellate courts does not include inferring material facts. *Eaves v. Penn*, 587 F.2d 453, 460 (10th Cir. 1978). Instead, their function is to review the propriety of the findings and conclusions expressed by the trial court, *Duffie v. Deere & Co.*, 111 F.3d 70, 74 (8th Cir. 1997), and, as provided by Rule 52(a), to uphold the trial court's findings of fact unless they are "clearly erroneous." *See also Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985) (explaining appellate court's function is to review findings, not make them *de novo*, and explaining meaning of "clearly erroneous" in Rule 52(a)); *Otero v. Mesa County Valley Sch. Dist.*, 568 F.2d 1312, 1316 (10th Cir. 1977) (to satisfy Rule 52(a), findings must indicate factual basis for court's general conclusion as to ultimate facts so as to facilitate meaningful review of issues presented). Here, however, the bankruptcy court did not state its findings and conclusions in a manner that enables us to

perform our reviewing function. We must, therefore, vacate the bankruptcy court's ruling and remand the case for findings and conclusions that comply with Rule 52(a). *See Joseph A.*, 69 F.3d at 1087; *Roberts v. Metropolitan Life Ins. Co.*, 808 F.2d 1387, 1390-91 (10th Cir. 1987) (where trial court provides only conclusory findings unsupported by subsidiary findings or explanation of court's reasoning, reviewing court cannot determine whether findings are clearly erroneous).

CONCLUSION

The bankruptcy court's order denying Tirey a discharge pursuant to § 727(a)(4) and (7) is vacated, and the case is remanded for a limited purpose. The bankruptcy court is hereby directed to state additional findings and conclusions *nunc pro tunc*.¹

When it supplements its findings and conclusions, the bankruptcy court might or might not amend its judgment. If the supplement does not modify the judgment, within twenty days of the filing of the supplement, either of the parties may restore the case to this court's jurisdiction by submitting a letter, with a copy of the supplement, to our Clerk. If the bankruptcy court does modify its judgment, a party seeking appellate review of the modified judgment should proceed by notice of appeal. *See Warner v. Orange County Dep't. of Probation*, 115 F.3d 1068, 1082 (2d Cir. 1997) (adopting this approach when trial court's ruling did not satisfy Rule 52(a)).

¹ To avoid any potential confusion, we note that we do not expect the bankruptcy court to hear additional evidence or argument from the parties, but simply to state additional findings and to explain its decision more completely.