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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit

August 29, 2005

**Barbara A. Schermerhorn
Clerk**

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE SANDRA JANETTE MAJORS, Debtor.	BAP No. KS-04-093 BAP No. KS-04-097
ERIC C. RAJALA, Trustee Plaintiff – Appellant – Cross-Appellee, v. SANDRA JANETTE MAJORS, Defendant – Appellee – Cross-Appellant.	Bankr. No. 02-24172-7 Adv. No. 03-6066 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before BOHANON, CORNISH, and BOULDEN,[1] Bankruptcy Judges.

BOHANON, Bankruptcy Judge.

The Appellant, the Debtor's Chapter 7 Trustee ("Trustee"), appeals a judgment in favor of the Debtor-Appellee ("Debtor") on his complaint that sought to deny the Debtor a discharge pursuant to 11 U.S.C. § 727(a)(2)(B) and

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] Hon. Judith A. Boulden, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Utah, sitting by designation.

(a)(4)(A).[2] The Debtor's cross-appeal seeks review of the judgment entered against her on the Trustee's claim for turnover pursuant to 11 U.S.C. § 542.

We AFFIRM the bankruptcy court on all Counts.

I. Background

The Debtor operated a janitorial service as a sole proprietor. She admits that the business had $24,174.77 in accounts receivable and $7,012.34 in a checking account on November 6, 2002, the petition date. She also admits that she collected $19,260.03 of the accounts receivable post-petition, which she spent along with the money in the checking account on business expenses. Her schedules reflected some business-related information, but did not disclose the accounts receivable or the checking account.

At the meeting of creditors, the Debtor testified initially that she had listed all her assets in the schedules. Upon further questioning, she disclosed the existence of the accounts receivable and checking account.

The Trustee brought a complaint with three claims: (1) Count I seeking turnover for the value of the accounts receivable and the money from the checking account; and (2) Counts II and III seeking denial of the Debtor's discharge. Specifically, Counts II and III sought to deny the Debtor a discharge for concealing or transferring post-petition bankruptcy estate property pursuant to 11 U.S.C. §727(a)(2)(B) and for making a false statement under oath pursuant to 11 U.S.C. § 727(a)(4)(A).

At trial, the Debtor testified that she had approximately 20 employees and that she continued to operate her business after she filed her petition. The Debtor oversaw all aspects of her janitorial service, including finding customers, supervising employees and independent contractors, billing and collecting from customers, and handling business expenses and payroll. In 2002, her business had

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[2] All future citations are to Title 11 unless otherwise indicated.

an average monthly profit of $21,000.

At the core of this matter is the Debtor's handling of the business's accounts receivable for November 2002. The Debtor readily admitted that she knew her customers owed for services rendered in October 2002 when she signed her bankruptcy petition. However, she explained that she did not list those accounts receivable in her schedules as an asset because she had not yet sent out those invoices.

She also explained that she did not list the business checking account because she thought the schedules distinguished between her personal account and the business account. In her mind, the accounts receivable and the business checking account were distinct from her personal finances, despite the fact that she operated the business as a sole proprietorship. She further testified that her attorneys did not explain the difference to her. Thus, when she was filling out papers for them to prepare her bankruptcy schedules, she only listed her personal information, not that of the business.

After hearing the Debtor's testimony and observing her demeanor, the bankruptcy court found that she did not understand the nuances of a sole proprietorship, namely that there is no distinction between her personal and business finances. Indeed, the bankruptcy court concluded that the facts amounted an honest mistake. The bankruptcy court aptly noted that the entire episode could have been avoided had the Debtor's counsel asked the proper questions.

The bankruptcy court took the claim for turnover under § 542 under advisement but later entered judgment in favor of the Trustee.

With these facts in mind, the Court turns to the applicable legal standards.

II. Standard of Review

We review the bankruptcy court's legal determinations de novo and its findings of fact for clear error. Mixed questions that are primarily legal determinations drawn from facts are reviewed under the de novo standard of review. See Gullickson v. Brown (In re Brown), 108 F.3d 1290, 1292 (10th Cir. 1997).

The Trustee insists the proper standard of review for Counts II and III is de novo. He contends that the bankruptcy court's factual findings concerning the Debtor's intent are based on an invalid legal defense; therefore, the Court should review those findings under the de novo standard.

Certainly, "when a lower court's factual findings are premised on improper legal standards or on proper ones improperly applied, they are not entitled to the protection of the clearly erroneous standard, but are subject to de novo review." Osborn v. Durant Bank & Trust Co. (In re Osborn), 24 F.3d 1199, 1203 (10th Cir. 1994). We disagree with the Trustee's argument that the bankruptcy court's findings of fact were based on improper legal standards or that it improperly applied the proper legal standards. The bankruptcy court's findings of fact, especially concerning the Debtor's intent, were proper. This is an instance in which the burden of proof and persuasion was on the Trustee, but he failed to carry those burdens. The bankruptcy court was simply convinced by the evidence presented that the Debtor did not act with the requisite intent. Moreover, based on the applicable legal standards, it is clear from the record that the bankruptcy court applied the proper legal standards. Thus, we review Counts II and III for clear error.

III. Counts II and III

Upon review of the record, we find that the bankruptcy court did not commit clear error in entering judgment for the Debtor on Counts II and III.

Count II sought a denial of the discharge under § 727(a)(2)(B) for the post-petition transfer, destruction, mutilation, or concealment of bankruptcy estate property. Count III sought a denial of discharge under § 727(a)(4)(A) for knowingly and fraudulently making a false oath.

We first consider Count II. To prevail under § 727(a)(2)(A), the Trustee must show by a preponderance of evidence that: (1) the Debtor transferred, removed, concealed, destroyed, or mutilated; (2) the property of the bankruptcy estate; (3) post-petition; (4) intending to hinder, delay, or defraud a creditor. See In re Brown, 108 F.3d at 1293 (stating the elements of § 727(a)(2)(A), which are fundamentally the same as those for § 727(a)(2)(B) other than the third outlined above).

Section 727(a)(2) requires actual fraudulent intent, and the bankruptcy court must "delve into the mind of the debtor." Searles v. Riley (In re Searles), 317 B.R. 368, 379 (9th Cir. BAP 2004). Intent can be inferred from the surrounding circumstances, and the course of the debtor's conduct is also relevant. Id. at 380. "Reckless indifference to the truth," such as failing to list substantial assets or to promptly amend the schedules to list those assets, is considered the equivalent to intentional fraud under § 727(a)(2). Lorenz v. Chambers (In re Chambers), 36 B.R. 791, 793 (Bankr. W.D. Ky. 1984).

The Debtor admits the first three elements are satisfied but contests whether she acted with intent to hinder, delay, or defraud. The Trustee argues the Debtor's subjective belief that the business (and its assets) was treated as a separate entity, that her lack of legal sophistication, and that she received poor legal advice are not valid legal defenses.

We disagree and believe that these factors are relevant to the Debtor's intent. They go to the heart of whether the Debtor made a mistake or whether she knowingly cheated her creditors by withholding valuable assets. It is noteworthy that she spent the funds from the checking account and from the accounts receivable in order to continue to operate her business, not on personal needs.

Intent is a question of fact, and the bankruptcy court was able to evaluate the Debtor's demeanor and assess her credibility. It believed that she did not understand that her business was not a separate entity. It believed that her attorneys did not counsel her sufficiently to know the difference. It could have just as easily concluded that she was being untruthful and found from the same evidence that she intended to defraud her creditors. We will not substitute our judgment for that of the bankruptcy court. See Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.") (citation omitted).

We pause to note that the Debtor's schedules did include sufficient references to business operations to place the Trustee on notice that Debtor was operating a janitorial business for which there would likely be cash on hand as well as accounts receivable due. Still, the Trustee took no action until the meeting of creditors was held.

We hold that the bankruptcy court did not commit clear error on Count II, and we now turn to Count III.

To prevail under § 727(a)(4)(A), the Trustee must show the following elements: (1) that the Debtor made a false statement under oath; (2) that the Debtor knew the statement was false; (3) that she made the statement with fraudulent intent; and (4) that the statement was material. See Kaler v. McLaren (In re McLaren), 236 B.R. 882, 894 (Bankr. D. N.D. 1999). Again, the bankruptcy court can infer fraudulent intent from the surrounding circumstances, and reckless indifference to the truth is the equivalent to actual fraudulent intent. See id. at 895. Omissions of assets from the schedules are considered false oaths for purposes of § 727(a)(4)(A). See Job v. Calder (In re Calder), 907 F.2d 953, 954 (10th Cir. 1990) (per curiam).

The sole issue for Count III again is the Debtor's intent, and the same reasoning we applied to Count II equally applies here. The bankruptcy court evaluated the evidence and concluded that the Debtor did not act with the requisite intent when she did not report the business checking account and accounts receivable on her schedules and when she did not amend her schedules to reflect them. Because the evidence supports alternative conclusions, we cannot say that the bankruptcy court committed clear error on Count III.

For these reasons, we must AFFIRM the bankruptcy court's decisions on Counts II and III.

IV. Count I

Finally, we must turn to the Debtor's cross-appeal concerning Count I. The bankruptcy court entered an order awarding the Trustee a money judgment for the value of the accounts receivable and the checking account that the Debtor disposed of post-petition.

The Debtor asks us essentially to craft an equitable remedy to 11 U.S.C. § 542(a) to afford her relief from the money judgment because she cannot afford to pay the judgment.[3] However, the undisputed evidence shows that the Trustee satisfied required elements, and Congress chose not to offer a statutory exception. We are not free to impose our wishes to fashion an exception to the sometimes

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[3] Section 542(a) provides that:

> (a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a).

harsh results of § 542(a). "In sum, while judges might crave the freedom to always decree what is equitable and socially useful in the cases before us the Supreme Court says that we do not possess it when a statute or rule provides clear direction." In re Horwitz, 167 B.R. 237, 238 (Bankr. W.D. Okla. 1994).

Moreover, as one bankruptcy court noted:

> [The defendant's] argument seemingly reads critical portions of § 542(a) out of the statute. The obligation to turnover extends not just to property presently in someone's possession, custody or control but to property in its "possession, custody or control during the case." Furthermore, if a lack of present possession, combined with an explanation, constituted sufficient compliance, little, if any, purpose would be served by the statutory alternative of requiring delivery of "the value of such property."

Boyer v. Davis (In re U.S.A. Diversified Products, Inc.), 193 B.R. 868, 874-75 (Bankr. N.D. Ind. 1995) (internal citations omitted), aff'd, 196 B.R. 801 (N.D. Ind.), aff'd, 100 F.3d 53 (7th Cir. 1996).

Therefore, we must AFFIRM the bankruptcy court's decision on Count I.

V. Conclusion

Accordingly, we hereby AFFIRM the bankruptcy court on all Counts.