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UNPUBLISHED OPINION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re)	
)	
DENNIS TERRY WYNN and)	Bankruptcy Case No. 89C-04188
RUAN V. WYNN,)	
)	
Debtors.)	
)	
)	
GAYLE B. STEWART, individually)	Adversary Proceeding No. 90PC-0297
and as general partner for)	
BELMONT PROPERTIES, a Utah)	
General Partnership,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
DENNIS T. WYNN,)	MEMORANDUM OPINION AND ORDER
)	DENYING DISCHARGE UNDER
Defendant.)	§ 727(a)(4)(A) and (a)(5)

The matter presently before the court is the resolution of the adversary proceeding of Stewart v. Wynn (Proceeding No. 90PC-0297). The trial of this matter commenced on March 13, 1991. James B. Hanks, Esq. represented the plaintiff,

Gayle B. Stewart ("Stewart"). Jamis M. Johnson, Esq. represented the debtor, Dennis T. Wynn ("debtor"). The court has considered the evidence and the arguments of counsel, and has made an independent review of the pertinent authorities. Now being fully informed, the court renders the following decision.

The debtor and his wife filed a petition seeking relief under Chapter 11 of the Code on July 12, 1989. On February 20, 1990, the debtors converted their case to one under Chapter 7. On May 14, 1990, the debtor and his wife received their discharge, with the debtor's discharge being subject to the present pending complaint.

At trial, the debtor testified that he has three years of college education. Until recently, he had been a real estate agent. His real estate license, however, has been revoked. The plaintiff, Stewart, testified that at the time of the transactions in question he was an assistant comptroller at First Interstate Bank. The relationship between the parties is their mutual partnership interest in Belmont Properties.

Stewart, on behalf of himself and as general partner of Belmont Properties, has filed the present complaint against the debtor alleging causes of action pursuant to 11 U.S.C. § 727(a)(2), (4), (5),¹ and (6); § 523(a)(2), (4), and (6); and for damages. The court will not consider the claims asserted under § 523 because it has concluded that the debtor's discharge will be denied pursuant to § 727(a)(4)(A) and (a)(5). The court

¹At trial the court granted Stewart's motion to amend his complaint to add a cause of action under this section.

has also determined that Stewart is entitled to a judgment against the debtor in the amount set forth in this opinion.

Bankruptcy Rule 4005 provides that the plaintiff has the burden of proving an objection to discharge. "While the plaintiff has the burden of persuasion, the burden of going forward with the evidence shifts to the debtor once the plaintiffs have shown the acts complained of occurred." Job v. Calder (In re Calder), 93 B.R. 734, 735 (Bankr. D. Utah 1988), aff'd, 907 F.2d 953 (10th Cir. 1990) (citing In re Martin, 698 F.2d 883, 887 (7th Cir. 1983)). While Rule 4005 does not address the standard of proof, the Tenth Circuit has determined that the plaintiff need only carry its burden under § 727 by a preponderance of the evidence. Farmers Co-Op Assoc. v. Strunk, 671 F.2d 391, 395 (10th Cir. 1982) (cited in Calder, 93 B.R. at 736). While the preponderance standard may be in question given the fact that Farmers Co-Op was a case decided under the Bankruptcy Act, numerous other courts have decided that a clear and convincing standard applies under the Code; see Barnett Bank v. Decker (In re Decker), 105 B.R. 79 (Bankr. M.D. Fla. 1989); C & G Cards & Gifts, Inc. v. Berman (In re Berman), 100 B.R. 658 (Bankr. E.D.N.Y. 1988); and the uncertainty of the preponderance standard under this section given the Supreme Court's recent decision under § 523 in Grogan v. Garner, 111 S.Ct. 654 (1991), the court concludes that even under a clear and convincing standard of proof, Stewart has established his case under § 727 and the debtor has failed to effectively rebut.

Section 727(a)(4)(A) of the Code states that a debtor's discharge will be denied if he or she knowingly and fraudulently, in or in connection with the case, makes a false oath or account. "The primary purpose of § 727(a)(4)(A) is to ensure that dependable information is supplied to those interested in the administration of the bankruptcy estate so they can rely upon it without the need for the trustee or other interested parties to dig out these true facts in examination or investigation." Calder, 93 B.R. at 737. "While our nation's bankruptcy laws offer those in difficult financial straits an opportunity to obtain a fresh start, certain obligations condition that opportunity, [in particular,] the obligation of truthful disclosure." Id.

In affirming the lower courts in Calder, the Tenth Circuit recently stated that an omission from a statement of affairs or schedule may constitute a false oath under § 727(a)(4)(A). 907 F.2d at 953. According to the Tenth Circuit, the false oath must relate to a material matter and must be made willfully with the intent to defraud. Id. at 955. In determining whether fraudulent intent exists, the court may infer it from the facts and circumstances of the case. Id. at 955-56 (citing In re Devers, 759 F.2d 751, 754 (9th Cir. 1985); Farmers Co-op. Ass'n, 671 F.2d at 395). "A reckless disregard of both the serious nature of the information sought and the necessary attention to detail and accuracy in answering may give rise to the level of fraudulent intent necessary to bar a discharge." Calder, 93 B.R. at 737. Finally, it is not a defense that the property that was not disclosed is worthless. Calder, 907 F.2d at 955.

Finding that the lower courts had not erred in concluding that the debtor in Calder had acted with fraudulent intent, the Tenth Circuit found it significant that "there was not one but four separate omissions from [the debtor's] Statement of Affairs and Schedule B-1." Id. Furthermore, the bankruptcy court in Calder rejected the debtor's asserted defense that, although he had not disclosed certain assets, he had informed the trustee of them. It stated that "the debtor may not hide behind the 'invisible cloak of disclosure' by alleging that, although not listed appropriately, the assets were revealed to the trustee at the Section 341 meeting of creditors and thereafter." 93 B.R. at 738.

In the present case, there has been clear and convincing evidence that the debtor has made numerous omissions in his statements and schedules. Stewart has produced competent evidence that the debtor has failed to disclose that within one year prior to filing bankruptcy he held: (1) at least three bank accounts through which, according to the stipulation of the debtor, large amounts amount flowed (Testimony of Ruan Wynn; Plaintiff's Exhibits 35-42; Admissions-Exhibit 43); (2) an ownership interest in real property located in Rockport, Utah (Testimony of Debtor; Plaintiff's Exhibits 2-3); (3) an ownership interest in real property located in Soda Springs, Idaho (Testimony of Debtor; Plaintiff's Exhibits 2-3); (4) an ownership interest in what was referred to as the "El Sid" condominium (Testimony of Debtor); and (5) a fifty per cent interest in InterWest Resources, Inc. Furthermore, the statements and schedules do not state that

within one year of the bankruptcy filing that: (1) the debtor was a party in at least seven lawsuits (Plaintiff's Exhibits 44-53; Admissions-Exhibit 43); (2) he was involved in a business venture with a woman by the name of Ruby Buck (Testimony of Debtor); (3) Twenty-four condominium units held by Belmont Properties were in receivership (Admissions-Exhibit 43, Testimony of Debtor); (4) the debtor settled a lawsuit in which he was a defendant by both pledging two condominium units that were owned by Belmont Properties and paying \$40,000.00 to Carol and Edward McLaughlin, co-trustees of the McLaughlin Family Trust (Testimony of Debtor; Admissions-Exhibit 43); and (5) he transferred at least \$22,000.00 to First Interstate Bank (Admissions-Exhibit 43). It should also be noted that the case file contains numerous amended schedules and matrices. None of the above-mentioned assets, however, are listed in the amendments.

The debtor has admitted that there are items that were not disclosed in his statements and schedules. (Testimony of Debtor; Admissions-Exhibit 43). His defense to the omissions has been that: (1) they were inadvertent because he was under a lot of stress at the time that the petition was filed; (2) the property involved was worthless or he did not think that it was property that he owned; (3) he disclosed the existence of the property and all of his activities to "Burton's office" and it failed to include the information in the schedules; and (4) he informed the trustee of the property and activities in question at his 341 meeting. These are not proper defenses. Most debtors are under a great deal of stress. Most debtors do not, however, inadvertently fail to

divulge as much information as the debtor has in this case. Like Calder, it is significant that there was not one omission, but rather, many material omissions. Moreover, as the Calder case instructs, a debtor may not determine the value of certain properties in deciding whether to disclose them in his bankruptcy schedules. All assets, worthless or not, must be disclosed. As for his purported disclosures to "Burton's office" and to the trustee, this debtor, as the debtor in Calder, may not "hide behind the invisible cloak of disclosure." The statements and schedules must reflect the status of the debtor's estate. The trustee and interested parties are not to be fed information in a piecemeal fashion throughout the term of the case. As the bankruptcy court pointed out in the Calder case, in order to receive his discharge, the debtor had a duty to properly disclose all of the information requested. He signed an affirmation which stated that he had read the statements and schedules and believed them to be true and accurate. Like Calder, the debtor here clearly had "a reckless disregard of both the serious nature of the information sought and the necessary attention to detail and accuracy" in answering questions posed to him in the statements and schedules. His failure to make a good faith effort to assure the accuracy of the papers filed with the court is grounds for the denial of his discharge.

It should be noted that the bankruptcy court's opinion and the Tenth Circuit's opinion in the Calder case stated that the debtor was an experienced bankruptcy attorney. 907 F.2d at 956; 93 B.R. 737, 739. While the level of sophistication of the

debtor may play a role in a determination of knowing and fraudulent intent to make a false oath; see, e.g., In re Mart, 87 B.R. 206 (Bankr. S.D.Fla. 1988); it is this court's opinion that the courts in Calder mentioned the fact that the debtor was an attorney because it made his acts particularly egregious and shocking. Notwithstanding the fact that the debtor in this case is not an attorney, the standards annunciated in that case are equally applicable. Furthermore, it should be noted that many of the transactions which were not disclosed involved real estate transactions. The debtor, having been a real estate agent, had a better than average level of sophistication of the transactions involved.

The court also finds that the debtor's discharge should be denied under § 727(a)(5). That section states that denial is proper when "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities." In this case, questions concerning the status of the debtor's assets were repeatedly met with the response that he "did not know" or that he "did not remember." This is simply not adequate. Further, the court notes that the debtor contradicted himself numerous times while under oath and, therefore, responses that were elicited lacked sufficient credibility. Accordingly, the debtor's discharge will also be denied under § 727(a)(5).

Finally, the court is faced with the issue of damages. Stewart alleges that because of certain of the debtor's actions and/or inactions during the course of their

partnership in Belmont Properties, he, or the partnership, were damaged in the amount of \$232,821.00. The court does not have sufficient evidence to award the sum requested by Stewart. Rather, the court renders judgment in favor of Stewart in the amount set forth below. The court's calculations are derived from Plaintiff's Exhibit 30, which is know as the "Stewart proof of claim."

(1) Raintree Deal: Stewart requests \$5,000.00 plus 16% interest for damages that he incurred as a result of what has been called the "Raintree deal." The evidence indicates that Stewart issued a cashier's check to the debtor so as to allow the debtor to put a down payment on property called Raintree Place. The debtor represented to Stewart that he had made the down payment. In fact, the debtor never had an opportunity to buy that property and the down payment was never made. Furthermore, the debtor never returned the \$5,000.00 to Stewart. Accordingly, Stewart is entitled to damages in that amount.

As to the issue of interest, Stewart claims that he is entitled to 16% from March 6, 1987, the date the check was issued, until July 12, 1989, the date the debtor filed bankruptcy. The court concludes that Stewart is entitled to the statutory rate of interest of 12% per annum; Utah Code Ann. § 15-1-4 (1986); calculated as of the dates set out by Stewart.

(2) Commission: When the Belmont Properties originally bought properties from First Interstate Bank, the Bank required that the partnership make a ten per cent down

payment. Six per cent of the down payment was a contribution of a real estate commission in the amount of \$81,228.00. Stewart claims that the partnership is entitled to one half of that commission. The evidence, however, is unclear as to how that commission was to be allocated. Accordingly, the court cannot determine damages.

(3) Management Fees: Under ¶ 10.B of an option contract executed by Belmont Properties and First Interstate Bank (Plaintiff's Exhibit 7), the Bank provided the partnership with funds in the amount of \$10,000.00 for use as management fees. The evidence indicates that the debtor improperly withdrew \$5,000.00 from this account. Thus, the court will award damages to the partnership in the amount of \$5,000.00.

(4) Unauthorized Withdraws from the Partnership Account: The debtor withdrew \$6,810.00 from a partnership account (Plaintiff's Exhibits 15-20). In response to questions concerning these funds, the debtor either answered that they were for commissions that were authorized by the partnership or that he does not know for what they were used. The court notes that the debtor has failed to provide it with an accounting of the monies. Nor has the court considered the debtor's testimony to be creditable. Accordingly, the court will award damages to the partnership in the amount of \$6,810.00.

(5) Lost Profits on Condominium Sales: It is uncontroverted that Belmont Properties had secured the sale of two condominium units to persons who were leasing those units at the time. It is also uncontroverted that the debtor had pledged those two

condominium units without the consent of the partnership. Stewart alleges that the partnership is entitled to damages in the amount of \$20,159.00, which represents one hundred per cent of the profits that were not earned on the sale of the two units. At trial, however, the court heard testimony that the units were to have been sold on contract. There is no evidence that the potential purchasers would have been able to fulfill their contract. In fact, the testimony indicated that one of the potential purchasers was ultimately evicted from the unit and the other moved to California. The court concludes, therefore, that the partnership has not proved a loss and damages will be denied.

(6) Forfeited Assets: Stewart's proof of claim asserts that because of the debtor's bankruptcy and his failure to negotiate in good faith, Belmont Properties was required to forfeit to First Interstate Bank its equity in properties that had been sold under contract. He maintains that the partnership is entitled to one hundred per cent of the loss of equity, or \$38,253.55. The court concludes that there is a lack of evidence as to this claim and, therefore, will deny damages.

(7) Alleged Partnership Loan: When Belmont Properties entered into its contract with First Interstate Bank, it agreed to make a ten per cent down payment to purchase certain properties. As heretofore discussed, six per cent of the down payment was the sales commission on the property. Stewart maintains that he loaned the partnership the other four per cent of the down payment in the amount of \$54,152.00 and that he

is entitled to recover those monies. In addition, he asserts that he is entitled to approximately \$20,000.00 in interest. The court concludes that the terms of the partnership agreement are not clear as to the issue of the debtor's contribution of the six per cent commission (Plaintiff's Exhibit 6), evidence was not presented that would enable the court to determine what the parties agreement was, and, therefore, damages cannot be ascertained.

(8) Attorney's Fees: The partnership agreement provides for the awarding of attorney's fees (Plaintiff's Exhibit 6). Stewart has asserted fees in the amount of \$15,000.00 (Plaintiff's Exhibits 30 & 33). Plaintiff's Exhibit 33, which is a schedule of the fees incurred, however, does not adequately explain the fees that were incurred. Accordingly, the court will award to Stewart and the partnership, jointly and severally, \$7,500.00, or one half of the fees requested.

(9) Additional Alleged Loans: Stewart maintains that he is entitled to \$25,000.00 for "additional partner loans." (Plaintiff's Exhibit 30). He goes on to state that the "exact amount [will] be determined in court. Unpaid partnership debts to be determined in court." (Id.) The court did not receive any evidence concerning these claims and, therefore, damages will not be awarded.

Finally, as part of the above-mentioned \$25,000.00 request, Stewart has made a claim for punitive damages which he maintains were to have been determined at trial.

The court finds that its denial of the debtor's discharge is a sufficient punitive measure. Therefore, monetary punitive damages will not be awarded.

Accordingly, it is HEREBY ORDERED that the debtor's discharge is DENIED pursuant to § 727(a)(4)(A) and (a)(5). Stewart is awarded damages in accordance with this opinion.

DATED this 26 day of March, 1991.

BY THE COURT:

A handwritten signature in cursive script, reading "Glen E. Clark", written over a horizontal line.

GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT