UNPUBLISHED OPINION

412

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:

ROBERT LEE CEVERING,

Debtor.

Bankruptcy Number 98B-30578
Chapter 7

DIANE GEORGE,

Plaintiff,

vs.

ROBERT LEE CEVERING,

Defendant.

Adversary Proceeding Number 99PB-2022

MEMORANDUM DECISION

David L. Miller, Esq., Layton, Utah appeared for the Plaintiff.

Stephen W. Farr, Esq., Ogden, Utah, and Catherine S. Conklin, Esq., Ogden, Utah appeared for the Defendant.

This nondischargeability proceeding raises the issue of whether punitive damages should be added to a debt stipulated to be nondischargeable because the debtor fraudulently concealed that he converted funds awarded to his ex-wife in a divorce decree. The Court concludes that the state statute of limitations ran on any state law conversion claim prepetition thus preventing an award of

punitive damages, and no provision of the Bankruptcy Code allows punitive damages under the circumstances of the case. The Court therefore grants the debtor's motion to dismiss that portion of the claim for relief seeking punitive damages, and only the stipulated amount of the debt is found to be nondischargeable. The plaintiff also seeks to deny the debtor's discharge under 11 U.S.C. §§ 727(a)(2) and (a)(4)(A) alleging that the debtor fraudulently transferred assets to prevent his ex-wife from taking them and later intentionally made materially false oaths in connection with his bankruptcy case. The Court concludes that the debtor's discharge should be denied pursuant to 11 U.S.C. § 727(a)(4)(A). The basis for these conclusions, reached after consideration of the credibility of the witnesses and evidence adduced at trial and an independent analysis of applicable law, is set forth below.

I. FACTS

Plaintiff Diane George (George) is the ex-spouse and only unsecured creditor of defendant Robert Lee Cevering (Debtor), the chapter 7 debtor herein. The twenty-one year marriage between George and the Debtor ended in divorce as evidenced by a Settlement Agreement dated July 3, 1992 (Settlement Agreement), and a Decree of Divorce dated September 21, 1992 (Decree), entered by the District Court for Weber County.

While working for railroad employers during the term of the marriage, the Debtor acquired two prospective assets that were allocated through the divorce proceeding: retirement benefits and a claim the Debtor was pursuing through counsel against his employer for a personal injury that he sustained on the job (Claim). Before they ever discussed the 1992 divorce, George and the Debtor discussed the potential of the Debtor recovering on the Claim. In planning for their 1992 divorce,

George and the Debtor discussed splitting the Debtor's retirement benefits between the Debtor and George. The Debtor was opposed to granting one-half of his retirement to George, and instead agreed to pay George one-half of the recovery on his Claim, although neither party knew the amount that the Debtor might receive.

The agreement regarding the allocation of any recovery on the Claim was memorialized in the Settlement Agreement which stated: "Defendant expects to receive a payment in settlement of certain claims against his employer. Defendant agrees to pay one-half (½) of these funds to [George] at the time these funds are received." Settlement Agreement at p.4 ¶ 9.[1] Both the Decree and the Settlement Agreement provide for the assessment of attorney fees and costs incurred in the divorce action. The Decree states that "[the Debtor] is hereby ordered to pay the attorney's fees and costs of court incurred by [George] herein." Decree, p. 4 ¶ 12. The Settlement Agreement, states that "[the Debtor] agrees to pay the attorney's fee and the court costs incurred by [George] as a result of this action." Settlement Agreement, p.4 ¶ 11.

The Debtor contacted George in 1994, indicated that he was tired of fighting to obtain compensation for his injury, and was going to settle the Claim for $30,000. His attorney ultimately obtained $200,000 from the Debtor's employer in settlement of the Claim (Settlement). Of the total,

---

[1] On September 21, 1992, the judge in the parties' divorce case signed and entered the Decree that stated that it was:

> Ordered, Adjudged and Decreed .... [that t]he Stipulation and Property Settlement Agreement of the parties concerning the division of property ... is hereby ratified, approved and confirmed in all its particulars, and is hereby incorporated in its entirety into this Decree of Divorce and each of the parties are hereby ordered and directed to do and perform all of the matters and things required to be done by each of them.

Decree at p. 3 ¶ 5. The only stipulation or settlement agreement filed in the parties' divorce case was the Settlement Agreement. The Debtor never timely appealed or otherwise contested the Settlement Agreement or subsequent Decree.

$70,000 of the Settlement went to attorneys' fees and costs. On May 24, 1994 by overnight mail, the Debtor's attorney sent the Debtor an explanatory letter together with a check for $130,000 as full payment in satisfaction of the Debtor's Claim against the employer referenced in the Settlement Agreement (Recovery).

On May 25, 1994, the Debtor deposited $29,975.00 of the $130,000 Recovery into Ogden Railway Employees Credit Union (later known as Goldenwest Credit Union), account number 11779-6. Account number 11779-6 was the family checking and savings account of George and the Debtor during their marriage. The Debtor continued to use account number 11779-6 as his primary checking and savings account after his 1992 divorce from George and still uses the account as his primary checking and savings account. On the same day, the Debtor used $25.00 of the $130,000 Recovery to open a new savings account in his name (account number 83191-7) at Goldenwest Credit Union and deposited the remaining $100,000 into it.

On July 6, 1994, the Debtor withdrew $15,000 from account number 11779-6 in the form of a cashier's check, took it to George's place of employment, and gave it to her. He represented to George that the amount received from his previous employer was $30,000, and paid George one half of that amount, or $15,000.

At around the time the Debtor received the $130,000 Recovery, George observed that the Debtor began purchasing personal property consisting of trucks, campers and trailers, and doubted that the Debtor had accurately represented the amount the Settlement to her. Approximately sixty days after she received the $15,000 payment, the Debtor brought an altered copy of the May 24, 1994 letter he received from his attorney to George's work and demanded that she read it. The Debtor

altered the May 24, 1994 letter by obliterating the dollar sign and the numeral "1" from the typed "$130,000.00," leaving only " 30,000.00." The altered copy of the May 24, 1994 letter made it appear that the Debtor's total net recovery was only $30,000 rather than $130,000. Although George briefly viewed the letter, she did not recognize that it was altered and no copy was left by the Debtor with her.

In spite of the representations in the altered letter, George continued to harbor doubts regarding the total amount of the Settlement, did not believe the representation in the letter regarding the Recovery, and just had a feeling that the Debtor received more money. That feeling was supported by the Debtor's continued acquisition of additional personal property including extra horse tack and a horse trailer. This pattern of additional purchases occurred within six months of the Debtor's presentation of the altered letter and continued into the spring of 1995. However, George took no further action at that time, other than asking the Debtor for a copy of the letter, which he refused to give her. Although beginning at about the time the Debtor received the Recovery and continuing through the spring of 1995, George believed the Debtor received more than $30,000, she decided to just "let it go" until just before July 20, 1998 when she learned the actual amount of the Settlement.

At that time, George demanded her court ordered one-half share of the Settlement. The Debtor refused to pay George any additional amounts. On July 20, 1998, George filed an Order to Show Cause in the parties' previous divorce proceeding, seeking a judgment against the Debtor in

the amount of $85,000 plus interest, fees and costs.[2] A hearing on the Order to Show Cause was scheduled to be held on October 7, 1998.

The Debtor filed his voluntary petition under chapter 7 of the United States Bankruptcy Code on October 1, 1998. This filing operated as an automatic stay of any hearing on Plaintiff's Order to Show Cause in the divorce case.

The Debtor filed statements and schedules signed under penalty of perjury with his petition on October 1, 1998. Those statements and schedules indicate that the Debtor's only asset, other than any interest in his home, was clothing worth $100, a leased vehicle, and an exempt retirement plan. The Debtor listed no checking, savings, or other financial accounts. The Debtor declared that he made no gifts greater than $200 per person to any family members or others in the one year preceding bankruptcy. The Debtor listed George and two home mortgage companies as his only creditors in this bankruptcy.

At the first meeting of creditors, the Debtor admitted, after affirming that he had listed all property in which he had an ownership interest in his statements and schedules, that he actually owned a large Cannon gun safe, a 243 Winchester rifle, a saddle, a compound bow, and a ride-on lawn mower. He also testified that he had both a checking and savings account at Goldenwest Credit Union. The Debtor testified that he had gifted more than $3,000 to his son within the year prior to filing bankruptcy and admitted that he was holding two horses on his property that belonged to a neighbor.

---

[2] George sought $85,000 because she believed she was entitled to half of the $200,000 Settlement, or $100,000. She received $15,000 from the Debtor on July 6, 1994, leaving a balance of $85,000.

The Chapter 7 Trustee ordered the Debtor to amend his statements and schedules within ten days and threatened to object to the Debtor's discharge and refer the Debtor for criminal prosecution based on the Debtor's omissions. Approximately two to three weeks after the first meeting of creditors, the Debtor amended his statements and schedules.

At trial, the Debtor testified that he signed the statements and schedules under penalty of perjury without reading them. He testified he had poor eyesight and had his then wife, Tammy Cevering (Cevering), fill out the statements and schedules for him. Cevering testified that she filled out the statements and schedules the way she did because she believed an asset was only "something that is worth a lot of money." When asked about the discrepancies between the statements and schedules and his testimony at the first meeting of creditors, the Debtor blamed memory problems due to medication he was taking at the time he filed his bankruptcy petition. At trial, the Debtor claimed that he did not own the riding lawn mower he claimed he did at the first meeting of creditors. The riding lawn mower is not listed on his amended schedules. The Debtor attempted to discredit his testimony at the initial meeting of creditors by (again) placing the blame on poor memory due to medication.

The Court finds that the Debtor's testimony regarding the inaccuracies on his statements and schedules was evasive and generally not credible. The Debtor was well aware of his assets and liabilities at the time of filing and the Debtor's intentional failure to adequately disclose those assets and liabilities is without excuse.

George timely filed a complaint to determine the debt owed to her is nondischargeable under 11 U.S.C. §§ 523(a)(5), (a)(15), 727(a)(2) and 727(a)(4)(A)[3] on January 19, 1999. The Court fixed July 1, 1999 as the cutoff date for discovery. On June 6, 1999, George filed a motion to amend the complaint to add six additional causes of action. The hearing on leave to amend was heard on July 1, 1999, and, because of the timing of the motion, the Court granted the motion only to allow the inclusion of a claim for relief under § 523(a)(4) and an assertion of punitive damages, and extended the discovery deadline to August 31, 1999. The complaint was amended to add a fifth cause of action plead under § 524(a)(4), asserting, among other things, that the Debtor committed embezzlement, illegally converted George's money and that the Court should award exemplary and punitive damages.

At trial, the Debtor conceded that the debt of $50,000[4] owed to George was nondischargeable pursuant to § 523(a)(15), and the trial proceeded upon George's other claims for relief, and upon the request for punitive damages. At the close of George's case, the Debtor moved to dismiss the request for punitive damages, which motion the Court took under advisement.

II. JURISDICTION

The Court has jurisdiction over this adversary proceeding by virtue of 28 U.S.C. §§ 1334, 157(a) and D.U. Civ. R. 83-7.1. Venue is proper under 28 U.S.C. §§ 1408 and 1409(a). This

---

[3] Future references are to Title 11 of the United States Code unless otherwise noted.

[4] The Debtor received a $130,000 Recovery from his Claim. George was entitled to one-half of that amount, or $65,000, pursuant to the Settlement Agreement and Decree. The Debtor paid George $15,000 on July 6, 1994. Consequently, the Debtor continued to be indebted to George for the remaining $50,000.

proceeding to determine the dischargeability of a debt is a core proceeding pursuant to 28 U.S.C. § 157(b)(1)(I), and this Court has jurisdiction to enter a final order.

III. ANALYSIS

George asserts that, in addition to the debt owed to her being nondischargeable pursuant to § 523(a)(15) as stipulated to by the Debtor, the debt is also nondischargeable pursuant to § 523(a)(4) and that therefore she should be entitled to punitive damages and to attorney fees.[5] George further asserts that the Debtor's discharge should be denied pursuant to §§ 727(a)(2) and 727(a)(4)(A).

A. Section 523(A)(4)

Embezzlement, for the purposes of nondischargeability proceedings, is defined under federal common law as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Klemens v. Wallace (In re Wallace)*, 840 F.2d 762, 765 (10th Cir. 1988) (citations omitted). The Debtor lawfully received the $130,000 Recovery from his Claim against his employer, but was required by the Decree to turn over to George her one-half share. Instead, the Debtor appropriated the funds he held for George's benefit by converting them to his own use when he deposited the funds into account number 83191-7 at Goldenwest Credit Union and thereafter used the funds for his own purposes. *Moore v. United States*, 160 U.S. 268, 271-72 (1895) (embezzlement is fraudulently converting property to offenders own use).

---

[5] The Debtor's stipulation to nondischargeability under § 523(a)(15) moots George's claim under § 523(a)(5). *See* § 523(a)(15) (indicating that a debt may be found nondischargeable under this section if it is "not of the kind described in paragraph [523(a)](5)").

The Debtor's fraudulent intent is evidenced not only by his oral misrepresentations to George, but by the alteration of the May 24, 1994 letter. The Debtor attempted to justify his actions by indicating that he was mislead regarding his rights in the divorce proceeding. He explained that during the divorce proceeding, he believed that George was entitled to part of the Claim, but subsequently learned that George had no entitlement to the Claim because it was based on personal injury. He also testified (apparently in the alternative) that during the divorce negotiations, he intended to share his retirement income with George, but never agreed to share any Recovery on his Claim with her. In fact, the Debtor testified that he believed this was the agreement contained in the Settlement Agreement that he signed. This disingenuous attempt by the Debtor to cloak his clearly premeditated conduct of converting George's property to his own use in violation of the Decree is simply a concoction to rationalize his fraudulent conduct. Therefore, George has proved, even by the higher standard of clear and convincing evidence,[6] that one-half of the Recovery owed to her and not paid ($50,000) is nondischargeable pursuant to § 523(a)(4).

B. Punitive Damages

George argues that she should be awarded punitive damages against the Debtor in the amount of $150,000 because the Debtor: 1) fraudulently altered a document to avoid a $50,000 obligation, 2) fraudulently misrepresented the document to avoid the $50,000 obligation, 3) transferred legal tile to property out of his name with the specific intent to avoid the $50,000 obligation, 4) filed bankruptcy to delay and thwart George's efforts to uncover the fraud and undo the transfers, 5) provided false information in his bankruptcy statements and schedules, 6) made a false oath at the

---

[6] Note however that "the standard of proof for the dischargeability exceptions in 11 U.S.C. § 523(a) is the ordinary preponderance-of-the-evidence standard." *Grogan v. Garner*, 498 U.S. 279, 291 (1991)

first meeting of creditors and at his deposition, 7) threatened George's counsel, and 8) delayed and forced George and the court to prosecute this matter to its final and full conclusion.

Whether the nondischargeable debt (stipulated by the parties to be $50,000) owed to George includes an obligation to pay exemplary or punitive damages requires an analysis of whether that nondischargeable debt includes the right to such a recovery. If the debt the Debtor owes to George includes the right to such a recovery, then the entire amount of the obligation is nondischargeable. *Cohen v. De La Cruz*, 523 U.S. 213, 218 (1998) (punitive damage award under state law held to be part of nondischargeable debt because part of fraud giving rise to § 523(a)(2)(A) claim); *KV Pharmaceutical Co v. Harland (In re Harland)*, 235 B.R. 769, 781-82 (Bankr. E.D. Penn. 1999) (punitive damages award issued in state court for debtors embezzlement nondischargeable); *Placer v. Dahlstrom (In re Dahlstrom)*, 129 B.R. 240, 246 (Bankr. D. Utah 1991) (a determination of whether a debt exists under § 101(12) is required before a determination of whether the debtor's actions make the debt nondischargeable). The determination of whether a debt for punitive damages is owed is controlled by §§ 101(12)[7] and (5)[8]. *Cohen*, 523 U.S. at 218 (1998) (finding that an award of treble damages, characterized as punitive damages, is a debt under §§ 101(12) and (5) because it constitutes a right to payment). Therefore the Court must determine whether George's nondischargeable debt includes a right to recover punitive damages.

---

[7] Section 101(12) states that "debt" "means liability on a claim."

[8] Section 101(5) states that "claim" means:
(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.
§ 101(5).

George cites several cases and relies on § 105 to support her claim for punitive damages. None of the cases cited by George support her claim for punitive damages. *See Cohen*, 523 U.S. at 215-17 (determining treble damages awarded by the bankruptcy court pursuant to a state rent control statute were nondischargeable as part of the prepetition claim under § 523(a)(2)(A));[9] *Progressive Motors, Inc. v. Frazier (In re Frazier)*, 220 B.R. 476 (D. Utah 1998) (upholding award of punitive damages under § 362(h) which expressly provides for punitive damages to be awarded in certain circumstances), *In re United States Voting Machine, Inc.*, 224 B.R. 165 (Bankr. D. Colo. 1998) (holding that in addition to bankruptcy court's power under Fed. R. Bankr. P. 9011, bankruptcy court has inherent authority to impose sanctions in order to control litigation abuses). Neither may the Court exercise its § 105 powers to award George punitive damages under the facts and allegations of this case. *See* § 105 ("court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title" (emphasis added)); *Principle Mutual Life Ins. Co. v. Langhorne (In re 848 Brickell Ltd)*, 243 B.R. 142, 151 (S.D. Fla. 1998) (denying request for punitive damages under § 105 finding that although punitive damages were appropriately awarded under Florida state law, record did not support argument that award of punitive damages was "necessary and appropriate" to carry out any provisions of the Bankruptcy Code); *Jove Engineering, Inc. v. I.R.S. (In re Jove Engineering, Inc.)*, 92 F.3d 1539, 1554 (11th Cir. 1996) (analyzing bankruptcy court's powers under § 105 and concluding that bankruptcy court may award monetary relief, but only to the extent "'necessary or appropriate' to carry out the provisions of the Bankruptcy

---

[9] Relying on *Cohen*, George argued that punitive damages could be awarded under § 523(a)(2)(A). *Cohen* does not support this conclusion. The punitive damages awarded in Cohen were not awarded under § 523(a)(2)(A), but were awarded under a state rent control statute and then added to the § 523(a)(2)(A) nondischargeability judgment. *Cohen*, 523 U.S. at 215-216.

Code"). The Debtor has not violated a provision of the Bankruptcy Code in such a manner that would make it "necessary and appropriate" for the Court to award punitive damages in this case.

However, this does not end the inquiry. If George can prove a debt exists under Utah law that would be nondischargeable and that debt includes a claim for punitive damages, the Court may properly include an award punitive damages in determining the total amount of the nondischargeable debt owed to George. Under Utah law, punitive damages may be awarded against a tortfeasor under certain circumstances as follows:

> [P]unitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

Utah Code Ann. § 78-18-1(a). Consequently, to determine whether George is entitled to these punitive damages, the Court must first determine whether the Debtor is a tortfeasor under Utah law.

The Court concludes that in prevailing on a claim of embezzlement under 11 U.S.C. § 523(a)(4), George also proved a cause of action for conversion under Utah state law. Under Utah law,

> [a] conversion is an act of wilful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession. . . . Although conversion results only from intentional conduct it does not however require a conscious wrongdoing, but only an intent to exercise dominion or control over the goods inconsistent with the owner's right.

Allred v. Hinkley, 328 P.2d 726, 728 (Utah 1958). *Accord Phillips v. Utah State Credit Union*, 811 P.2d 174, 179 (Utah 1991); *Fibro Trust, Inc. v. Brahman Financial, Inc.*, 974 P.2d 288, 295-96 (Utah 1999). *See also Moore*, 160 U.S. at 272 (embezzlement consists of the fraudulent conversion

to one's own use); *Wallace*, 840 F.2d at 765 (New Mexico state action that plead that Debtor fraudulently obtained monies and intentionally converted the monies was sufficient to constitute embezzlement under § 524(a)(4)). As set forth above, the Debtor converted George's money when he deposited her $50,000 into the Goldenwest Credit Union account number 83191-7 and thereafter used the funds for his own purpose. George was entitled to the $50,000 as soon as the Debtor received his Recovery. Not only did George not know the actual amount of the Recovery, she did not know of the existence of the bank account and had no access to it.

Although George proved a claim for conversion under Utah law, her claim is time barred under the applicable statute of limitations, even taking into account that the statute of limitations may have been tolled for a period of time due to the Debtor's fraudulent concealment of his conversion. Under Utah law, a cause of action for conversion is subject to a three year statute of limitations. Utah Code Ann. § 78-12-26(2). When a defendant fraudulently conceals a cause of action, the statute of limitations period does not begin to run until the discovery of the facts forming the basis of the cause of action. *Berenda v. Langford*, 914 P.2d 45, 50-51 (Utah 1996) (citations omitted). To determine when a party is deemed to have discovered a fraudulently concealed cause of action, the Utah State Supreme Court has stated that consideration is given to:

> (i) when a plaintiff would reasonably be on notice to inquire into a defendant's wrongdoing despite the defendants's efforts to conceal it; and (ii) whether a plaintiff, once on notice, would reasonably have, with due diligence, discovered the facts forming the basis of the cause of action despite the defendant's efforts to conceal those facts.

Id. at 52. *See also Aurora Credit Services, Inc. v. Liberty West Development, Inc.*, 970 P.2d 1273, 1278 (Utah 1998) (upholding fraudulent concealment doctrine set forth in *Berenda*).

The evidence indicates that, although George did not generally believe either the representations in the May 24, 1994 letter altered by the Debtor or his oral representations regarding the amount of his Recovery as early as July of 1994, by no later than the spring of 1995 she believed the amount she received was incorrect because of the new property acquired by the Debtor. She then determined not to pursue the matter until over three years later on July 20, 1998, when she filed the Order to Show Cause.

Applied to the facts of this case, George was reasonably on notice to inquire into the Debtor's actions, at the latest, when she realized that he had purchased substantial amounts of property by the spring of 1995. Had George brought her Order to Show Cause in the divorce proceeding in the spring of 1995, she could have discovered the actual amount of the Settlement because it was the subject of the Decree. Therefore, the applicable statute of limitations regarding the Debtor's conversion of her funds through his embezzlement began to run no later than the spring of 1995. George's Order to Show Cause was filed on July 20, 1998, several months past the three year time limit.

Because George's claim for conversion under Utah state law is time barred by the applicable statute of limitations, George is not entitled to punitive damages under Utah Code Ann. § 78-18-1(a).[10] Therefore, her nondischargeable debt does not include an obligation to pay or a right to recover punitive damages. The Debtor's oral motion to dismiss George's request for punitive damages is granted.

---

[10] This ruling, based on the controlling statute of limitations, is not intended to sanction the reprehensible conduct of the Debtor at the time he embezzled and converted George's property. Nor is it intended to sanction his continuing attempts to rationalize his fraudulent conduct on the witness stand at the trial of this case.

C. Attorney Fees

George argues that she is entitled to her attorney fees and costs incurred in this action because she is essentially enforcing the Decree. The Decree states that "[the Debtor] is hereby ordered to pay the attorney's fees and costs of court incurred by [George] herein." Decree, p. 4 ¶ 12. The Settlement Agreement, incorporated into the Decree of Divorce, states that [the Debtor] agrees to pay the attorney's fee and the court costs incurred by [George] as a result of this action." Settlement Agreement, p.4 ¶ 11. Neither of these statements provides for the continuing assessment of attorney fees, but merely allocates the burden of attorney fees incurred in the divorce action, itself. *See e.g. Dennison v. Hammond (In re Hammond)*, 236 B.R. 751, 769 (Bankr. D. Utah 1998) (declining to award attorney fees in § 523(a)(15) action when there was no case law, contractual, or statutory basis); *Armstrong v. Armstrong (In re Armstrong)*, 205 B.R. 386, 393-94 (Bankr. W.D. Tenn 1996) (analyzing paragraph in divorce decree providing for continuing assessment of attorney fees).

D. Section 727(A)(4)(A)[11]

George asks the Court to deny the Debtor's discharge under § 727(a)(4)(A) because the Debtor made false oaths both in writing and orally in connection with his bankruptcy case. Section 727(a)(4)(A) provides that the Court shall deny the Debtor's discharge if "the debtor knowingly and fraudulently, in or in connection with the case -- (A) made a false oath or account." § 727(a)(4)(A). As set forth by the Tenth Circuit: "In order to deny a debtor's

---

[11] George plead a cause of action under § 727(a)(4)(A) in her complaint and prosecuted that cause of action through both the Plaintiff's Pre-Trial Memorandum Brief and the Plaintiff's Proposed Findings of Fact and Conclusions of Law and at trial. Although the parties' Pre-Trial Order does not specifically refer to § 727(a)(4)(A), it describes a cause of action under § 727(a)(4)(A), but references § 727(a)(2). The Court concludes that the reference to § 727(a)(2) is merely a typographical error in the Pre-Trial Order. George's § 727(a)(4)(A) claim was properly before the Court at trial.

discharge pursuant to [§ 727(a)(4)(A)], a creditor must demonstrate by a preponderance of the evidence that the debtor knowingly and fraudulently made an oath and that the oath relates to a material fact." *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1294 (10th Cir. 1997) (citation omitted). *See also Job v. Calder (In re Calder)*, 907 F.2d 953, 955 (10th Cir. 1990) ("To trigger section 727(a)(4)(A), the false oath must relate to a material matter and must be made willfully with intent to defraud."). Section 727(a)(4)(A) "sanctions debtors who deliberately fail to make proper disclosures, and is intended to ensure that dependable information is supplied to interested parties so they can rely on it without having to uncover true facts through investigation." *Bailey v. Ogden (In re Ogden)*, 1999 WL 282732, *7 (10th Cir. BAP April 30, 1999).

In this case, the Debtor filed schedules, signed under penalty of perjury, indicating that he had no checking, savings, or financial accounts and that his only assets were an interest in his home, clothing worth $100, a leased vehicle and an exempt retirement plan. At the first meeting of creditors, the Debtor testified under penalty of perjury that he had listed all property in which he had an interest at the time he filed his bankruptcy petition in his schedules. However, at the first meeting of creditors, the Debtor testified that he owned a large Cannon gun safe, a 243 Winchester rifle, a saddle, a compound bow, and a ride-on lawn mower[12] and that he had both a savings and a checking account at Goldenwest Credit Union.

The Debtor also filed statements, signed under penalty of perjury, indicating that he had not gifted more than $200 to family members within the year prior to his filing bankruptcy. At

---

[12] At trial, the Debtor testified that he did not own the ride-on lawn mower.

the first meeting of creditors, the Debtor testified that he had gifted in excess of $3,000 to his son within the year prior to his filing bankruptcy.

The Debtor's omissions were material because they concerned the Debtor's assets and disposition of property. *See e.g. Calder*, 907 F.2d at 955 (finding material omission because "omitted information concerned the existence and disposition of property, irrespective of value") (citing *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.")); *Farmers Co-Op Assoc. of Talmage v. Strunk*, 671 F.2d 391 (10th Cir. 1982) (denying debtor a discharge under the Bankruptcy Act for understating balance in checking account). The Debtor's omissions were also knowing and fraudulent. "[F]raudulent intent may be deduced from the facts and circumstances of a case." *Calder*, 907 F.2d at 956. The Debtor was sufficiently aware of his assets at the time he filed his petition to truthfully declare them. He chose not to. The Debtor's discharge is denied pursuant to § 727(a)(4)(A).[13]

---

[13] Because the Debtor's discharge is denied pursuant to § 727(a)(4)(A), the Court need not rule on George's allegations under § 727(a)(2).

IV. CONCLUSION

Based on the foregoing, the Court finds that $50,000 owed by the Debtor to George pursuant to the Decree is nondischargeable pursuant to § 523(a)(15) as stipulated by the parties and pursuant to § 523(a)(4). George is not entitled to an award of punitive damages or attorney fees. The Debtor's discharge is denied pursuant to § 727(a)(4)(A).

DATED this 14 day of April, 2000.

JUDITH A. BOULDEN
United States Bankruptcy Judge