IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re: MELVIN J. CARSON Debtor.	Bankruptcy Case Number 01-27055 Chapter 7
DUANE H. GILLMAN, Chapter 7 Trustee and MING HUA ZHANG, an individual, Plaintiffs, v. MELVIN J. CARSON, Defendant.	Adversary Proceeding Number 01-2326

MEMORANDUM DECISION

This matter brings two fundamental issues surrounding a denial of discharge under review: first, which party has the burden to reconstruct financial records to fulfill the requirements of 11 U.S.C. § 727(a)(3);[1] and second, when is a debtor's omission of facts from his statements and schedules done knowingly and fraudulently and thus in violation of § 727(a)(4)(A). After hearing oral argument, judging the credibility of the witnesses, considering

[1] All future references are to Title 11 of the United States Code, unless otherwise stated.

the exhibits, and making an independent review of applicable case law, the Court enters the following memorandum decision regarding these issues.

FACTS

On May 15, 2001, Melvin J. Carson (Debtor) filed a Chapter 7 bankruptcy petition and filed financial statements and schedules (Statements and Schedules). Duane H. Gillman is the duly appointed Chapter 7 Trustee (Trustee) in the case, and Ming Hua Zhang (Zhang) is a creditor of the Debtor (collectively the "Plaintiffs").

A. Financial Documents.

During the ten years prior to filing, the Debtor's primary source of income was the construction business. He owned and operated a residential construction company under the name of Carson Construction. The Debtor was the principal agent and manager of Carson Construction and was responsible for maintaining the company's financial records. During the late 1990s, the Debtor constructed condominiums in Draper, Utah, known as Aspen Central, that contained at least five separate units. Susan Perkins (Perkins), purchased one of these condominiums from the Debtor in 1996, and Zhang purchased another condominium in February of 1998. Apparently, a portion of the construction was financed through a commercial lender, and the Debtor was responsible for obtaining insurance and dealing with liens of subcontractors. The Debtor filed tax returns reflecting the revenue from Carson Construction. From 1997 to 1999, Carson Construction generated approximately $1.6 million in revenue.

Sometime during 1998, the Debtor ceased operations through Carson Construction and moved to Oklahoma in order to participate in a development project with Bill Vickson (Vickson). The Debtor claims he has no written interest in the Vickson project. Apparently, the

project never reached fruition and Vickson and the Debtor had a falling out. The Debtor asserts that Vickson owes him an undisclosed amount of money. The Debtor spent a portion of his time in Oklahoma selling haircare products, and he testified that he did not earn any money from any other sources. His living expenses were paid for by Vickson, with whom he lived. The Debtor testified that he took the Carson Construction financial documents with him to Oklahoma and that many of the documents were lost during his frequent relocations.

At some point, the Debtor returned to his home at Aspen Central and eventually decided to file bankruptcy. The Debtor did not disclose in his Statements and Schedules that he owned and operated Carson Construction during the six years immediately preceding the filing of the petition. The only references to Carson Construction were the following accounts receivable listed as uncollectible at Schedule B, ¶ 15: Sharon Evens; Mike Molin; DFCU and Associated Title for $21,500; and a trust deed note owed by Alex Arbia (aka Uribe) for $27,000. The Debtor scheduled the current market value of these accounts receivable as "unknown." He did not disclose any obligation owed to him by Vickson. The Debtor attempted to excuse these omissions by asserting that the attorney who represented him in preparation of the Statements and Schedules failed to discuss the documents he filed with him in detail.

At the initial meeting of creditors held August 3, 2001, the Trustee made a detailed and thorough request of documents to be produced by the Debtor. The request included bank statements, checks, deposit slips, bank books and check registers for any account utilized by the Debtor for any financial dealing; state and federal income tax returns, documents evidencing Debtor's financial activities in Oklahoma; and any original loan documents. In response to this

request, the Debtor produced various records related to his personal finances and construction projects in which he or Carson Construction had participated.[2]

On October 23, 2001, the Plaintiffs filed a complaint against the Debtor alleging various violations of § 727(a). In conjunction with this adversary proceeding, the Plaintiffs retained an accountant, Mark D. Hashimoto (Hashimoto), as an expert witness to investigate the Debtor's financial records. Hashimoto submitted two reports of retained expert: one in January 2003 and a subsequent report filed after reviewing additional documentation produced by the Debtor. After reviewing all documentation produced by the Debtor, Hashimoto testified that there is still a lack of financial records that would allow him to analyze the Debtor's material business transactions, either in Utah or in Oklahoma, and that he cannot verify the figures set forth on the Debtor's tax returns. Hashimoto came to the following conclusions which he included in his final report:

(1) Carson Construction was active from approximately 1996 to 1998-99;

(2) Carson Construction produced approximately $1.6 million in revenues from 1997 to 1999;[3]

(3) the Debtor failed to produce any information with respect to the sale of the Aspen Condominiums;

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[2] According to the Plaintiffs' expert's final report, the following categories of documents were produced by the Debtor: (1) personal tax returns for 1997, 1998, 1999, and 2000; (2) trust deed with an assignment of rents between Alex Uribe (aka Arbia) and the Debtor; (3) various documents relating to the Aspen Project; (4) documents relating specifically to Aspen Condo units #1, #2, #3, #4, and #6; (5) loan draw summaries from Draper Bank & Trust; (6) ACORD certificate of liability insurance; (7) waiver of lien to Karmen Kitchens; (8) canceled check and check stubs; (9) check registers; and (10) bank statements.

[3] Carson Construction reported gross sale of $1,420,500 in 1997, $158,800 in 1998 and $6,300 in 1999.

(3) the Debtor failed to produce all relevant bank records, and without such basic information it is impossible to determine what cash activity took place between March 1997 and May 2001;

(4) the Debtor has failed to produce financial records which would allow Hashimoto to analyze the Debtor's specific financial transactions while in Oklahoma; and

(5) the Debtor failed to produce any financial statements, general ledger or other account summaries that would allow the expert to analyze the completeness or accuracy of the tax returns the Debtor produced.[4]

In sum, Hashimoto stated, "the Debtor has failed to produce financial records related to his personal financial affairs and the financial affairs of his construction business in a sufficient quantity or quality from which the Debtor's financial condition or business transactions might be ascertained."[5] The Debtor did not present any evidence to refute this conclusion. When the Debtor was asked whether he had attempted to reconstruct his financial records, he stated he does not have sufficient funds for such an undertaking.

B. 1965 Thunderbird

The parties dispute the Debtor's interest in a 1965 Thunderbird (the "Thunderbird") and whether the Debtor's failure to properly list that interest is grounds for denial of discharge. Sometime during 1998, Edward Sietsma (Sietsma), a friend of the Debtor, left a 1965 Thunderbird in a visitor parking stall at Aspen Central. Sietsma relocated to Montana, has never returned to this area, and the Thunderbird has remained in the visitor stall over the intervening years. Apparently the permanent presence of the Thunderbird in the parking lot of Aspen Central caused concern among some of the condominium residents. As a result, members of the

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4 Hashimoto's Rep. Ex. 3.

5 Hashimoto's Rep. Ex. 3.

homeowner's association held a meeting on August 14, 2000 attended by the Debtor, Perkins, her husband Mike Perkins, and Zhang. Both Zhang and Perkins testified that they heard the Debtor claim ownership of the Thunderbird at the meeting. Perkins also testified that she saw the Debtor driving the Thunderbird sometime in the fall of 2000. Someone maintained the Thunderbird in good repair and someone has continually covered it to protect it from the weather. Contrary to his reported declaration of ownership, the Debtor alleges that he spoke with Sietsma in late 2001, and they agreed that Sietsma would pay a $25 monthly fee to the Debtor for the storage of the Thunderbird in a stall at Aspen Central.

The Debtor asserts he had no interest in the Thunderbird, did not own it and was not keeping it for Sietsma. The Debtor's Statements answer "none" to the question at ¶ 14 that requires a listing of property held for another person. The Debtor's Schedule B, ¶ 23 lists a 1995 GMC truck but not the Thunderbird. No claim against Sietsma for monthly parking fees from 1998 to 2001 is listed in the Debtor's schedules.

Contradicting his Schedules and Statements, some nine months post-petition on February 22, 2002, the Debtor filed an ownership statement with the Utah State Tax Commission's Division of Motor Vehicles (DMV), in which he represented that Sietsma had moved to Montana, failed to pick the car up within six months, and had failed to pay the Debtor rent. On the ownership statement, the Debtor stated that he had been in possession of the Thunderbird since October 26, 1998.

In addition to the ownership statement, the Debtor also filed an application for original title with the DMV.[6] The Debtor was listed as the primary owner of the Thunderbird and the

[6] The application itself is not dated.

Debtor's son, Scott Carson, was listed as the secondary owner. However, the Title, Lien, and Registrations Information System Report, acquired on April 28, 2003, stated that Scott Carson was the primary owner of the vehicle and that the secondary owner was Carson Construction.[7] When asked to explain why the Thunderbird had been placed in the names of Scott Carson and Carson Construction, the Debtor claimed that this was not his intention and that he had intended to put the car in his own name.

From the evidence, it is clear that the Debtor cared for, used and claimed ownership of the Thunderbird prior to filing, and that he had either an ownership or possessory interest in the Thunderbird as of the date of filing. Although the vehicle existed just outside his condo, the Debtor failed to disclose his interest in his Schedules and Statements. The Court deems the assertion that Sietsma rented storage space at $25 per month for the Thunderbird only after late 2001 not credible, as this version ignores the presence of the vehicle in the parking lot for the prior three years.

DISCUSSION

This Court must determine whether the Debtor should be denied his discharge under § 727(a)(3) for failing to keep or preserve financial records by which his business transaction could be ascertained, and whether the Debtor's discharge should be denied under § 727(a)(4)(A)

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[7] The Debtor re-registered Carson Construction as a limited liability company on November 5, 2002. The Debtor is the manager and a member of the newly registered Carson Construction.

for making a false oath. Both of these issues must be proved by a preponderance of the evidence.[8]

I. Jurisdiction and Venue

This Court has original and exclusive jurisdiction over this adversary proceeding under 28 U.S.C § 1334, and the proceeding is core as set forth in 28 U.S.C. § 157(b)(2)(J). Venue is proper under 28 U.S.C. § 1409.

II. Failure to Keep and Preserve Financial Records

The Plaintiffs assert that the Debtor has failed to keep and preserve sufficient financial records as required by § 727(a)(3), thereby making it impossible to ascertain the business transactions of the Debtor. The Court must deny a debtor's discharge if:

> [T]he debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.[9]

The Plaintiffs must prove (1) that the Debtor failed to maintain and preserve adequate records; and (2) that the "failure made it *impossible* to ascertain [his] financial condition and *material* business transactions."[10] If Plaintiffs can establish these elements, the burden shifts to the Debtor

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[8] *First National Bank of Gordon v. Serafini (In re Serafini)*, 938 F.2d 1156, 1157 (10th Cir. 1991).

[9] § 727(a)(3).

[10] *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1295 (10th Cir. 1997) (emphasis in original); *Cadle Company v. Stewart (In re Stewart)*, 263 B.R. 608, 615 (B.A.P. 10th Cir. 2001). *See also United States v. Ellis*, 50 F.3d 419, 425 (7th Cir. 1995) (holding that § 727 makes a complete financial disclosure a condition precedent to discharge).

to justify his failure to maintain financial records.[11] The Tenth Circuit has further explained that "'[r]ecords need not be so complete that they state in detail all or substantially all of the transactions taking place in the course of the business. It is enough if they sufficiently identify the transaction that intelligent inquiry can be made respecting them.'"[12]

A. Failure to Maintain Adequate Records.

The focus of the Plaintiffs' complaint is the failure to maintain adequate records from which the Debtor's business transactions can be ascertained. The Debtor's personal records are not at issue. The Debtor admitted that many of Carson Construction's financial records were missing, and that he has no records of his business transactions while in Oklahoma. When asked to explain the absence of these records, the Debtor claimed he either lost them or left them behind in Oklahoma. It is clear from the Debtor's testimony and Hashimoto's report that the Debtor failed to keep and preserve records; however, the Court must still determine whether the Debtor's failure made it impossible to ascertain the Debtor's material business transactions.

B. Ascertainment of Carson Construction's Financial Condition and the Debtor's Material Business Transactions.

When determining whether a debtor's failure to maintain records makes it impossible to ascertain his or her material business transactions, this Court must consider (1) the nature of the enterprise the Debtor is involved in; (2) the sophistication of the Debtor; and (3) the quality of the records provided.[13]

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[11] *Brown*, 108 F.3d at 1295.

[12] *Stewart*, 263 B.R. at 615 (citing *Hedges v. Bushnell*, 106 F.2d 979, 982 (10th Cir. 1939)).

[13] *Brown*, 108 F.3d at 1295 (examining the debtor's type of business and the common types of financial transactions that occur in that type of business).

1. Nature of the Enterprise.

Carson Construction had substantial business dealings constructing and selling real property between 1996 to at least 1998 or 1999. With revenues of $1.6 million, it can hardly be argued that the Debtor's construction business was anything other than a substantial enterprise that required record keeping for tax, accounts receivable and accounts payable purposes, and for debt service. Because the Debtor was involved in real estate transactions, documentation of those transactions was also essential for the protection of all parties to the transactions, and to establish title to the real estate.

The Debtors business transactions with Vickson are unclear, since there are no records at all related to the venture. However, it appears from the evidence that the Oklahoma venture was not substantial.

2. Sophistication of the Debtor.

No evidence was presented regarding the Debtor's formal education. However, the Debtor testified that he owned and operated Carson Construction for years prior to filing for bankruptcy, and that Carson Construction's real estate ventures generated substantial revenues between 1997 and 1999. The preponderance of the evidence establishes that the Debtor was a small business owner who was sufficiently sophisticated to own and operate his company.

3. Quality and Completeness of the Records Provided.

Although the Debtor did produce financial records, the financial records provided depict a sketchy picture of Carson Construction and its business transactions. The significant lack of records leaves numerous holes in Carson Construction's financial history. Hashimoto's expert report included a list of missing records that were essential to reconstructing the material

business transactions of Carson Construction prior to 2001. For example, the Debtor obtained financing to build Aspen Central, but there are no records available indicating debt service, or the ownership and sale of these condos after they were completed. The Court is able to determine that Carson Construction generated revenue from 1997 to 1999, but few records exist evidencing the source of that income. The Debtor clearly filed tax returns from 1997 to 1999, however, insufficient records exist to verify the figures stated in the returns. The Debtor's Schedules listed various accounts receivable, but there are no records indicating how and when these accounts were generated that can be utilized by the Trustee to collect the accounts.

In addition to these insufficiencies, Hashimoto testified that there are missing bank statements, ledgers, and canceled checks from the bank accounts used by Carson Construction. While addressing the adequacy of a debtor's financial records, the Seventh Circuit stated, "[m]any courts faced with checking account records, canceled checks, deposit slips, bank statements, and tax returns as the sole documentation of a debtor's financial history and condition have determined that such records are inadequate under § 727(a)(3)."[14] Since the Debtor has produced insufficient ledgers, this case falls within the Seventh Circuit's description. Further, the Seventh Circuit held that a debtor's records should demonstrate the debtor's losses and gains and present satisfactory explanation of receipts and disbursements.[15] The Carson Construction

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[14] *In re Juzwiak*, 89 F.3d 424, 428 (7th Cir. 1996) (citing *In re Frommann*, 153 B.R. 113, 117-18 (Bankr. E.D.N.Y. 1993); *Vetri v. Meadowbrook Mall Company*, 174 B.R. 143, 146 (M.D. Fla. 1994); *In re Vandewoestyne*, 174 B.R. 518, 522-23 (Bankr. C.D. Ill 1994); *In re Pimpinella*, 133 B.R. 694, 696-98 (Bankr. E.D.N.Y. 1991); *In re Schultz*, 71 B.R. 711, 717 (Bankr. E.D. Pa. 1987); *In re Morando*, 116 B.R. 14, 15 (Bankr. D. Mass. 1990); *In re Shapiro*, 59 B.R. 844, 848 (Bankr. E.D.N.Y. 1986)) (parenthetical statements omitted).

[15] *In re Marx*, 125 F.2d 335, 336 (7th Cir. 1942).

records produced by the Debtor provide glimpses of some of its business transactions but the gaps created by the missing documents are sufficiently wide to make it impossible for this Court to determine the material business transactions of Carson Construction or to allow the Trustee to make intelligent inquiries regarding the assets of the estate.

The Debtor's business transactions while in Oklahoma can be dealt with more expeditiously. The Debtor testified that his intent in moving to Oklahoma was to engage in a land development project with Vickson. For reasons not elaborated upon at trial, the project did not come to fruition and, as a result, the Debtor spent his time in Oklahoma selling haircare products. The Debtor claims that he did not make any money while in Oklahoma, that Vickson paid for all of his living expenses, and that Vickson owed him money. However, there are no documents that would support the Trustee's demand on Vickson for whatever amount the Debtor claims is owed to him. The Debtor has not provided the Court with any relevant evidence regarding his business transaction in Oklahoma. The absence of any records makes it impossible for this Court to make an intelligent inquiry regarding the Debtor's material business transactions.

In *Brown*, the Tenth Circuit found that a debtor's failure to keep and preserve certain financial documents was not sufficient to deny the debtor his discharge under § 727(a)(3).[16] However, the facts in *Brown* can be distinguished from the present case. The debtor in *Brown* collected and sold cars as a hobby, and the Tenth Circuit excused the debtor's failure to keep and preserve financial records stating that he was not engaged in the sale of these cars for profit and

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[16] *Brown*, 108 F.3d at 1295.

that cash sales were common place.[17] Here, the Debtor, as the principal of Carson Construction, was not merely engaged in the hobby of construction: he owned and operated a construction company for his livelihood that generated approximately $1.6 million in revenue. The construction and sale of condominiums is not usually accomplished through simple cash sales, and such projects usually require application for and approval of financing as well as extensive planning and subcontracting. The facts before this Court present a more complex and revenue intensive business venture than those of the relatively simple car collecting hobby illustrated in *Brown*.

3. Justification.

Because the Plaintiffs have met their burden of establishing that the Debtor failed to keep and preserve records from which the Debtor's business transactions may be ascertained, the burden now shifts to the Debtor to justify his failure to keep and preserve records in order to avoid a denial of discharge.[18] The Debtor raises four defenses: (1) he lost the records; (2) neither the Internal Revenue Service (IRS) nor the Utah Department of Commerce and Commercial Code (Department of Commerce) require the records Hashimoto described, and Hashimoto was obligated to contact the Debtor as though he were an auditor, to find the missing information; (3) the Trustee should be required to obtain the records from a third source; and (4) the Plaintiffs must show that the Debtor knowingly and fraudulently failed to keep the records.

The Debtor's excuse for the failure to produce records was that he either left many of the financial records in Oklahoma or lost them during his various moves. The Court finds this

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[17] *Id.* at 1295.

[18] *Id.*

excuse insufficient in light of the nature and complexity of the Debtor's business dealings. There is no allegation that circumstances beyond the Debtor's control destroyed the records, only that the Debtor failed to keep them.

Counsel for the Debtor argued that neither the IRS nor the Department of Commerce have any specific requirements regarding the type of business records that a small construction company must maintain, and that it would be unfair to place the constraints of complex corporate accounting on a small construction company in order for it to establish its material business transactions for purposes of Chapter 7 bankruptcy. It is irrelevant whether the Department of Commerce or the IRS requires maintenance of specific accounting records from small business owners. The relevant inquiry is whether the Debtor's accounting records are complete enough in quality and quantity to make an intelligent inquiry into the material business transactions of the Debtor. The Court has already found that the Debtor failed to produce business records by which the Trustee could ascertain the Debtor's material business transactions or collect the assets of the estate; therefore, it is irrelevant what records or maintenance regulations these two government agencies might impose.

To further justify the inadequacies of his financial records, the Debtor asserts that he substantially complied with the requirements of § 727(a)(3) by producing all of the records in his possession. He asserts that any inadequacies in the financial records were due to the Trustee's or Hashimoto's failure to contact the Debtor and reconcile the inadequacies, and that the Trustee should have reconstructed the Debtor's financial history.

Neither the Trustee nor Hashimoto was under an obligation to reconstruct the Debtor's financial history. Hashimoto was hired for the limited task of determining whether the financial

records the Debtor had produced were sufficient to ascertain his financial condition and material business transactions. Hashimoto had no obligation to contact the Debtor directly, nor would it have been appropriate for Plaintiffs' expert to do so. Had he done so, the Debtor's counsel would probably have been the first to complain about such an improper contact with his client.

Furthermore, the Court finds that the burden of reconstructing the Debtor's financial history does not fall upon the shoulders of the Trustee, his expert, or the creditors.[19] When the Debtor chose to file a Chapter 7 bankruptcy, he voluntarily subjected himself to the requirements of Title 11 of the United States Code in order to obtain the fresh start provided by a discharge.

The Court recognizes that exceptions to discharge should be construed strictly against the Plaintiffs and liberally in favor of the Debtor,[20] and that the Court must first look to the language of the statute. The plain language of § 727 states that a debtor will be granted a discharge unless "*the debtor* has . . . failed to keep or preserve" financial information. The statute places the burden of maintenance and preservation on the Debtor, not the Trustee, creditors or their experts. Were the burden shifted to the trustee, every Chapter 7 trustee would have the daunting task of not only reviewing each of the Debtor's financial records, but also the burden and cost of production of those documents. Such a result would be untenable, and neither the Code nor applicable law justifies shifting the burden to the Trustee. The Seventh Circuit has stated,

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[19] *See e.g. Peterson v. Scott (In re Scott)*, 172 F.3d 959, 969-70 (7th Cir. 1999) (holding that a Chapter 7 Trustee does not have an obligation to reconstruct a debtor's financial condition by combing through boxes of records); *Hughes v. Lieberman (In re Hughes)*, 873 F.2d 262, 264 (11th Cir. 1989) (holding that bankruptcy judge is not obligated to dig through records to reconstruct a debtor's assets); *Goff v. Russell Co.*, 495 F.2d 199, 201-02 (5th Cir. 1974) (holding that a trustee is not obligated to reconstruct a debtor's financial condition even though it could have been accomplished by three months of investigation and $2,500).

[20] *In re Ingalls*, 297 B.R. 543, 547 (Bankr. C.D.Ill. 2003); *Founders Bank & Trust v. Swift (In re Swift)*, 72 B.R. 563, 565 (Bankr.W.D. Okl. 1987).

"courts and creditors should not be required to speculate as to the financial history or condition of the Debtor, *nor should they be compelled to reconstruct debtor's affairs.*"[21] For the reasons stated above, the Court finds that the burden to produce records falls soley upon the Debtor.

The Debtor also asserts that even if his records were incomplete, and even if he failed to adequately justify the insufficiencies, the Plaintiffs have the burden of establishing that he did these things intentionally and knowingly. In support of this argument, the Debtor claims that a violation of § 727(a)(3) is a violation against the bankruptcy system, and therefore akin to a criminal violation under one of the provisions of Title 18 of the United States Code, although which provision was not disclosed. As such, the Plaintiffs must establish by a preponderance of the evidence that the Debtor acted intentionally and fraudulently when failing to fulfill the requirements of § 727(a)(3). The Court disagrees with the Debtor's argument.

Various courts have held that "intent is not an element of a § 727(a)(3) objection to discharge."[22] This Court agrees. Unlike its surrounding subsections, there is no element of intent found anywhere in § 727(a)(3). Section 727(a)(2) requires intent to hinder or delay and § 727(a)(4)(A) requires a debtor to knowingly and fraudulently make a false oath, but § 727(a)(3) does not contain a *mens rea* element. Title 18 of the United States Code imposes criminal sanctions for bankruptcy crimes such as concealment of assets, false oaths, and bribery. The

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[21] *Juzwiak*, 89 F.3d at 428 (emphasis added).

[22] *Community Bank of Homewood-Flossmoor v. Bailey (In re Bailey)*, 145 B.R. 919, 924 (Bankr. N.D. Ill. 1992) (citation omitted); *Northmark Bank v. Herzog (In re Herzog)*, 140 B.R. 936 (Bankr. D.Mass. 1992). Other courts have held that a debtor can be denied his discharge under § 727(a)(3) even though the debtor did not intend to violate the statute. The debtors in *Herzog* were denied a discharge under § 727(a)(3) because they failed to distinguish liabilities between various entities under their control. The court denied the discharge even though the debtors had not acted intentionally. *Id.*

Debtor's failure to produce sufficient financial records could be an element of a criminal prosecution for concealment or fraud, but even though the same undesirable act can lead to criminal or civil sanctions, it does not follow that every sanctionable act under Title 11 must be committed knowingly.[23] Therefore, the Court finds that § 727(a)(3) does not contain an intent element and Plaintiffs are only required to establish, by a preponderance of the evidence, that the Debtor failed to keep and preserve records by which his material business transactions could be ascertained. The Plaintiffs have met this burden.

III. Knowingly and Fraudulently Making a False Oath

Plaintiffs' second cause of action asserts that the Debtor should be denied his discharge because he "knowingly and fraudulently, in or in connection with the case – made a false oath or account."[24] Specifically, Plaintiffs contend that the Debtor made a false oath (1) when he failed to disclose his involvement with Carson Construction; and (2) when he failed to list the Thunderbird as an asset, as property held for another person, or to list the alleged receivable from Sietsma on his Statements and Schedules. These contentions will be addressed together under each element required by § 727(a)(4)(A).

While addressing the appropriateness of a denial of discharge under § 727(a)(4)(A), the Tenth Circuit stated:

> In order to deny a debtor's 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. A debtor will not be denied discharge if a false statement is due to mere mistake or

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[23] *In re DeSoto*, 181 B.R. 704, 711 (Bankr. D. Conn. 1995) (stating that failure to schedule in good faith is illicit conduct which is actionable civilly or criminally).

[24] § 727(a)(4)(A).

> inadvertence. Moreover, an honest error or mere inaccuracy is not a proper basis for denial of discharge.[25]

In order for this Court to deny the Debtor his discharge under this § 727(a)(4)(A), the Plaintiffs must establish (1) that the Debtor made a false oath; (2) that the oath relates to a material fact; and (3) that the oath was made knowingly and fraudulently. The Court may not deny the Debtor his discharge if his false oath was a result of mistake or inadvertence.

A. False Oath

Plaintiffs contend that the Debtor made a false oath when he failed to disclose his involvement with Carson Construction on his Statements and Schedules. The Debtor has admitted this omission. The Debtor's Statements and Schedules indicate that he was not involved in any businesses during the relevant time period. When asked to explain the omission, the Debtor merely stated that he did not know why he had failed to list Carson Construction.

The Debtor was operating Carson Construction off and on during the six years prior to filing for bankruptcy. The language in the Statements and Schedules is not convoluted and legalistic, nor is it long or difficult to understand. It is not credible that the Debtor either misunderstood the questions in the Statements and Schedules or simply forgot about Aspen Central, especially when he lives there. The Debtor has failed to establish that this omission was due to an excusable mistake, and the Court concludes that the Debtor made a false oath.

The Debtor's second false oath relates to the Thunderbird. Much of the testimony presented at trial addressed whether the Debtor either possessed or owned the Thunderbird when he filed his petition in May 2001. It is undisputed that the Debtor both failed to list the Thunderbird as property held for another, or failed to list it as the Debtor's personal property.

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[25] *Brown*, 108 F.3d at 1294-95 (citations omitted).

The Thunderbird was located outside the Debtor's condo, and it is not credible that it simply slipped his mind. Either he believed he owned the vehicle, as evidenced by his statement made at the home owners association meeting, and later declarations on the documents to obtain a duplicate title, or he was holding it for Sietsma. If, in fact, the Debtor was simply holding the vehicle for Sietsma, which seems unlikely, then the evidence indicates he was owed storage fees that should have been listed as an asset. The more likely scenario is that Sietsma simply surrendered the Thunderbird to the Debtor when he moved to Montana. Either way, the Debtor was required to disclose the vehicle on his Statements and Schedules. The total omission of the Thunderbird, either as the Debtor's property, or as property held for another with a concurrent receivable, constitutes a false oath.

B. Omission of a Material Fact

The Tenth Circuit has adopted the Eleventh Circuit's definition of a material fact as one that "'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 property.'"[26] The evidence presented establishes that the Debtor owned and operated Carson Construction for ten years prior to filing for bankruptcy. Between the years of 1997 and 1999, Carson Construction reported almost $1.6 million in revenue. This amount of income bears an obvious relationship to the Debtor's estate and concerns the discovery of the Debtor's business dealings, and potentially the existence and disposition of property. Accordingly, the Court finds that the Debtor's failure to list Carson Construction on his Statements and Schedules was an omission of a material fact.

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[26] *Job v. Calder (In re Calder)*, 907 F.2d 953, 955 (10th Cir. 1999) (quoting *In re Chalik*, 748 F.2d 616, 618 (11th Cir. 1984)).

The omission of the Thunderbird also concerns a material fact. The Thunderbird, or rent for its storage, was an asset of the estate, yet the Debtor completely failed to list it on his Statements and Schedules. The Debtor's failure to disclose the existence of the Thunderbird robbed the Trustee of the opportunity to determine whether the Thunderbird was property of the estate, or to collect the rent if it was owed. The Court finds that the ownership and control of the Thunderbird is clearly a matter material to the Debtor's Chapter 7 bankruptcy.

C. Knowingly and Fraudulently

The Tenth Circuit has instructed that "[f]raudulent intent may be deduced from the facts and circumstances of the case."[27] However, a debtor will not be denied a discharge if a false statement was due to mere mistake or inadvertence.[28] No specific evidence was presented regarding the Debtor's intent. Therefore, it is left to this Court to determine from the facts and circumstances of this case whether there is enough evidence on the record to infer intent.

At trial the Debtor was asked to explain why he did not list his interest in Carson Construction in his Statements and Schedules, and the Debtor's insufficient response was that he did not know why it was not listed. Counsel for the Debtor implied that perhaps the Debtor's former counsel had not sufficiently educated the Debtor regarding the Debtor's Statements and Schedules. The inference that the blame belongs on the Debtor's attorney because he should have discussed the Debtor's business ventures with him in more detail, is rejected. A Debtor's attorney in no more required to search out undisclosed business ventures that the Debtor fails to disclose than the Court is.

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[27] *Id.* at 956.

[28] *Brown*, 108 F.3d at 1294.

In addition, the Debtor also failed to disclose his possible interest in the Thunderbird and never even attempted to correct these omissions despite having two opportunities to disclose the existence of the Thunderbird on his Statements and Schedules. First, paragraph 14 of the Debtor's Statements and Schedules required the Debtor to "list all property owned by another person that the debtor holds or controls." The Debtor checked "none" in response. The Debtor also failed to list the Thunderbird when he only listed one vehicle, a 1995 GMC truck, on his Schedule B. These omissions were made less than one year after the Debtor claimed to be the owner of the Thunderbird at the homeowner's association meeting.

The Debtor's failure to claim an interest in the Thunderbird on his Statements and Schedules is inconsistent with his post-petition acts and representations. When asked to explain the omission of the Thunderbird, the Debtor claimed that he did not think he had to list the car because he did not own it. However, less than a year after filing for bankruptcy the Debtor made an application to the DMV for original title, and subsequently transferred ownership to his son, Scott Carson, and Carson Construction.

The Court has already determined that the Debtor failed to keep and preserve adequate records regarding his material business transactions. This finding, coupled with the fact that the Debtor was not candid about his business transactions, leads to an inference that the Debtor was attempting to hide his business dealings and assets. Examined as a whole, the facts and circumstances of this case preponderate that the Debtor intentionally omitted material information from his Statements and Schedules. Accordingly, the Court finds that the Debtor's omissions of material facts in this proceeding constitute a false oath under § 727(a)(2)(A) made knowingly and fraudulently.

CONCLUSION

As set forth above, the Court concludes that the Plaintiffs have met their burden to show that the Debtor has failed to maintain records by which his material business transactions could have been ascertained. The Debtor has failed to show a justification or excuse for that failure. As a result, the Plaintiffs' cause of action seeking denial of discharge under § 727(a)(3) will be granted.

The Court also concludes that the Plaintiffs have met their burden to show that the Debtor has knowingly and fraudulently, in or in connection with the case – made a false oath or account. Therefore, the Plaintiffs' cause of action seeking denial of discharge under § 727(a)(4)(A) will be granted.

A separate Judgment will issue under Fed. R. Bankr. P. 9021.

DATED this 24th day of October 2003.

Judith A. Boulden
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I hereby certify that on this ___ day of October 2003, I caused a correct copy of the foregoing **MEMORANDUM DECISION** to be mailed, postage prepaid and addressed a follows:

Duane H. Gillman
McDowell & Gillman, P.C.
Twelfth Floor
50 West Broadway
Salt Lake City, UT 84101
Attorney for Plaintiff Chapter 7 Trustee

Richard C. Terry
CORBRIDGE, BAIRD & CHRISTENSEN
39 Exchange Place, Suite 100
Salt Lake City, UT 84111
Attorney for Plaintiff Zhang

Daniel Boone
10 West 300 South
Salt Lake City, UT 84101
Attorney for Debtor

Thomas D. Neeleman
9 Exchange Place, Suite 417
Salt Lake City, UT 84111

Melvin J. Carson
3215 South 945 East
Salt Lake City, UT 84106