UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re:

MARK E. BENKOWSKI,

Debtor.

Chapter 7

Case No. 10-38603-jes

PATRICK S. LAYNG,
UNITED STATES TRUSTEE,

Plaintiff,

-v-

Adversary No. 11-2394

MARK E. BENKOWSKI,

Defendant.

DECISION

Mark Benkowski ("debtor") has fallen on hard times. In 2001, he took over his family business, which he operated through a corporation entitled Custom Design Associates Inc. ("CDA") and which had been engaged in interior home remodeling. CDA became a victim of the declining economy, and the debtor stated that the business "went down hill." As a result, its employees were laid off and eventually CDA ceased operations entirely. The debtor's home, which he called his "dream home," succumbed to foreclosure in 2001. He went through a divorce and spent some time in 2010 and 2011 in jail for contempt for failing to maintain child support. He

filed his bankruptcy petition on November 22, 2010.

That was not the end of his problems. The United States Trustee ("UST") filed this adversary proceeding seeking a denial of the debtor's discharge under § 727(a)(4)(A) of the Bankruptcy Code based upon false oath.

On February 23, 2012, this adversary proceeding came on for trial. Testimony was presented and exhibits received into evidence. The court thereafter took this matter under advisement.

The basis for the UST's complaint is debtor's failure to disclose in his bankruptcy schedules and statement of financial affairs the following:

1. $50,000 inheritance which the debtor received in May of 2010 from his parents, both of whom died in 2009.

2. $11,783 which debtor received from his mother's IRA approximately 10 months before he filed his bankruptcy petition.

3. $28,000 which debtor withdrew from his own IRA in August and December of 2009.

4. Ownership of five guns.

5. Debtor's transfers of funds totaling approximately $66,000 to CDA over a period from December, 2009, through May, 2010, which occurred within two years prior to the filing of his bankruptcy petition.

In response, the debtor testified that these omissions were without intent to deceive. He explained that he initially filed his bankruptcy schedules and statement of financial affairs at the time he filed his petition "in a hurry" because on the following day he had a hearing scheduled before the Waukesha County family court

commissioner in connection with his divorce proceedings, and he wanted to be in a position to inform the family court commissioner that he had just filed for bankruptcy. The debtor further stated he believed he could "put the real stuff in the schedules" at a later time. He also said he thought that the assets which were omitted did not constitute income and that he was not required to disclose them in his bankruptcy schedules. He also stated that he was told by his bankruptcy attorney that he could correct any omissions by amending his schedules and statement of financial affairs if anything had been forgotten. His testimony revealed that the omitted items were not disclosed to his attorney until after his bankruptcy petition, together with schedules and statement of financial affairs were filed.

Sec. 727(a)(4)(A)

Under Sec. 727(a)(4)(A) of the Bankruptcy Code, the following elements must be established:

1. Debtor made a statement under oath,
2. which is false,
3. debtor knew the statement was false,
4. statement was made with fraudulent intent, and
5. statement related materially to the bankruptcy case.

The burden of proof is upon the UST to prove these elements by a preponderance of the evidence.

The first, second, and fifth elements under § 727(a)(4)(A) have all clearly been established. Omissions from bankruptcy schedules and statement of financial

affairs constitute a false oath for purposes of § 727(a)(4). In re Glenn, 335 B.R. 703 (Bankr. W.D. Mo. 2005); In re Bostrom, 286 B.R. 352, 360 (Bankr. N.D. Ill. 2002); In re Happel, 394 B.R. 915 (Bankr. E.D. Wis. 2008).

The remaining elements under § 727(a)(4)(A) to be addressed are: whether the debtor knew the omissions from his bankruptcy schedules and statement of financial affairs were false and whether these omissions were done with fraudulent intent.

Fraudulent intent is a difficult element to establish because generally the debtor is the only person able to testify as to what his intent was, and it is unlikely that such debtor will admit to any fraudulent intent. In re Abramov, 329 B.R. 125 (Bankr. E.D. N.Y. 2005). In this case, however, this court concludes that the debtor knew these omissions from his bankruptcy schedules and statement of financial affairs were major items and should have been included in the schedules.

The debtor is not a naive individual. He has had 1 ½ years of college training at the University of Wisconsin-Stevens Point and has also operated his own business. His testimony that he believed he could correct these omissions at a later time because he was in a rush to file his bankruptcy schedules is no excuse. He could easily have filed the bankruptcy petition alone and, as authorized by Bankruptcy Rule 1007(c), later filed his schedules and statement of financial affairs within 14 days after the time his bankruptcy petition was filed.

The court need not decide if there was actual fraudulent intent on the part of the debtor if it finds that the debtor's actions constituted reckless disregard.

Reckless disregard is the equivalent of fraudulent intent and is the equivalent of fraud for purposes of § 727(a)(4). See In re Yonikus, 974 F.2d 901, 905 (7th Cir. 1992); In re Chavin, 150 F.3d 726, 728 (7th Cir. 1998); and In re Tully, 818 F.2d 106, 112 (1st Cir. 1987).

As a result, this court concludes that all of the requisite elements of nondischargeability under § 727(a)(4)(A) have been met by a preponderance of the evidence and the debtor shall be denied a discharge under § 727(a)(4)(A). This court fully recognizes that a denial of discharge is a harsh remedy. At the same time, neither a bankruptcy trustee nor a debtor's creditors should be required to engage in a laborious tug of war to drag out the truth in the glare of daylight. In re Tully, 818 F.2d at 110. There were numerous, material inaccuracies or falsehoods in the debtor's bankruptcy petition and schedules.

The foregoing constitutes this court's findings of fact and conclusions of law pursuant to Federal Bankruptcy Rule 7052.

A separate order for denial of discharge shall be issued.

Dated at Milwaukee, Wisconsin, this 5th day of June, 2012.

BY THE COURT:

James E. Shapiro

JAMES E. SHAPIRO
U. S. BANKRUPTCY JUDGE