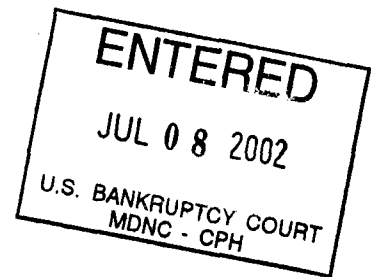


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION



IN RE:

Hearsal R. Barnette and
Ola E. Barnette,

Debtors.

Michael D. West,
Bankruptcy Administrator,

Plaintiff,

v.

Hearsal R. Barnette and
Ola E. Barnette,

Defendants.

Case No. 00-80450C-7D

Adversary No. 01-9002

MEMORANDUM OPINION

This adversary proceeding came before the court on April 18, 2002, for trial. Michael D. West appeared on behalf of the plaintiff and Arthur M. Blue appeared on behalf of the defendant debtors. The parties submitted stipulations of fact and exhibits as the evidence to be considered along with the pleadings on record.

NATURE OF PROCEEDING

This is a dischargeability proceeding brought under § 727(a)(4)(A) of the Bankruptcy Code based upon an alleged failure

by the debtors to file accurate schedules and statements of financial affairs. Raymond J. Roberts, counsel for one of the creditors, instituted this adversary proceeding on January 29, 2001. Roberts alleged that debtors were not entitled to a discharge of their debts because they knowingly filed schedules that failed to disclose certain corporate interests and other property interests owned by the debtors. Based upon such conduct, Roberts alleged that the defendants should be denied a discharge pursuant to § 727(a)(4)(A). Roberts and the defendants reached a settlement on or about April 30, 2001. However, Michael D. West, Bankruptcy Administrator, filed a motion to intervene in order to preserve the objection to discharge, regardless of the settlement reached by the parties. On August 2, 2001, an order was entered substituting Michael D. West, Bankruptcy Administrator, as the party-plaintiff.

FACTS

Debtors Hearsal and Ola Barnette filed a Chapter 13 petition on February 22, 2000. Debtors converted their case to Chapter 7 on May 3, 2000, after objections to confirmation and a motion to dismiss the case were filed.

The plaintiff and the defendants now stipulate that the debtors made an inaccurate or false oath by signing the bankruptcy schedules which they knew were incorrect, in that the schedules did not fully disclose all of their assets. Specifically, debtors

failed to list in their schedules the following assets and interests which were owned on the petition date:

- (1) Shares of stock in Barnette Auto & Truck Sales, Inc. ("Barnette Auto"), an active corporation that did not have any assets and was not conducting any new business;
- (2) Shares of stock in Top-Value Auto Sales, Inc., an active corporation that was not conducting any new business, but had approximately \$70,000 in its bank accounts and approximately \$175,000 in accounts receivable;
- (3) Shares of stock in Triangle Motor Sales, Inc.;
- (4) Shares of stock in Son-Bar, Inc., an active corporation that owned real estate in Fayetteville, North Carolina;
- (5) Shares of stock in Wing-Air Lease, Inc., an active corporation that had assets;
- (6) Interest income from floor planning owed to Mr. Barnette;
- (7) An indebtedness of \$42,500 owed to Mr. Barnette by Barnette Auto;
- (8) A golf cart;
- (9) A horse owned by Mrs. Barnette which was in the possession of her brother;
- (10) A ruby ring, valued at \$2,000, which was owned by Mrs. Barnette but transferred post-petition to her granddaughter as a gift.

The debtors claim that they assumed that the corporations were

"worthless and insolvent" since the companies were not conducting new business and since the companies owed more money than they were worth. The debtors further claim that the omission of their interests in these corporations is excusable because counsel erroneously advised them that they did not have to disclose their interests in companies which they claimed were worthless.

DISCUSSION

In order for this court to deny debtors their discharge pursuant to § 727(a)(4)(A)¹, the plaintiff must first establish that the Barnettes made a false oath. The burden of establishing that debtors made a false oath and account may be satisfied by a showing that debtors failed to disclose assets in their schedules and statement of affairs. See In re Downey, 242 B.R. 5 (Bankr. D. Idaho 1999); In re Farouki, 14 F.3d 244 (4th Cir. 1994); In re Krich, 97 B.R. 919 (Bankr. N.D. Ill. 1988); In re Weldon, 184 B.R. 710 (Bankr. D.S.C. 1995); In re Baldrige, 256 B.R. 284 (Bankr. E.D. Ark. 2000). "The recalcitrant debtor may not escape a section 727(a)(4)(A) denial of discharge by asserting that the admittedly omitted or falsely stated information concerned a worthless relationship or holding; such a defense is specious." In re Downey, 242 B.R. at 14 (quoting In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984)). "A 'false oath' sufficient to merit a denial of

¹ Section 727(a)(4)(A) of the Bankruptcy Code states that a "court shall grant the debtor a discharge, unless the debtor knowingly and fraudulently...made a false oath or account."

discharge includes a misrepresentation or an omission in the debtor's bankruptcy Schedules or Statement of Financial Affairs." In re McLaren, 236 B.R. 882, 894 (Bankr. D.N.D. 1999) (citing In re Beaubouef, 966 F.2d 174, 178 (5th Cir. 1992)). The requisite intent to deceive exists where a debtor, in the first instance of filing a petition, schedules or statement of financial affairs, makes statements therein, exceeding honest mistake, which are inconsistent or incompatible with her own knowledge and information. Id. at 895.

The stipulations as well as Mr. Barnette's 2004 examination establish that the debtors did not disclose their interests in various assets and corporations which did hold assets. Plaintiff therefore has met the burden of proving that the debtors made a false oath or account when they signed their petition and represented that their schedules were accurate. Moreover, such failure to disclose was inconsistent with debtors' own knowledge and information and, given the number and nature of the property interests that were not disclosed, cannot be passed off as an honest mistake or innocent oversight.

The Barnettes contend that they nonetheless are entitled to receive a discharge because their failure to disclose such assets was the result of receiving bad advice from their attorney. In order to have the benefit of the defense of erroneous advice of counsel, courts have required that debtors supply correct

information to their counsel. The court in McLaren held that a debtor's reliance on her attorney to properly complete her schedules did not preclude denial of debtor's discharge based on false oaths made to the attorney in preparing such schedules. The court stated that "[a] debtor has an uncompromising duty to disclose whatever ownership interest he holds in property." Id. at 894 (quoting In re Lunday, 100 B.R. 502, 507 (Bankr. D.N.D. 1989)). The court stated that in order for a debtor to successfully assert the defense of bad advice of counsel regarding her inaccurate schedules, the debtor must show that she provided her attorney with accurate information with which to complete the schedules. "Reliance on attorney advice absolves one of intent only where that reliance was reasonable and where the advice given was informed advice. The attorney must have been made fully aware of all relevant facts - that is, the debtor must have made a full and fair disclosure." Id. at 897 (quoting In re Erdman, 96 B.R. 978, 985 (Bankr. D.N.D. 1988)). The court went further by stating that even if the mistakes on debtor's schedules had resulted from erroneous advice of counsel, rather than being based on false information given to the attorney by debtor, a debtor still has a duty to personally ensure that all information in the schedules is accurate, and an attorney's errors or omissions do not absolve a debtor of this duty. See id. at 898.

In In re Hatton, 204 B.R. 470 (Bankr. E.D. Va. 1996), debtors'

discharge was denied because the inaccurate schedules listed their corporation as having no value when in fact the corporation had substantial value. The court held debtors responsible for the information omitted from the filings because they read the statements and schedules and declared under penalty of perjury that the information was true and correct. See id. at 477. In the same regard, the debtors could not rely on the defense of advice of counsel because they did not supply accurate information to their attorney who prepared the schedules. See id.

In this case, the Barnettes' defense of relying on their attorney's bad advice does not have merit. The Barnettes failed to make adequate disclosures to their attorney of corporate assets and certain other property interests. In fact, Mr. Barnette made misrepresentations to his attorney regarding the corporations when he told his attorney that his corporations did not have assets, when in fact he knew that they did have assets.

Even if the Barnettes could rely on the defense of erroneous advice of counsel as to their corporate interests, the court finds that the Barnettes failed to disclose their interests in other assets consisting of a golf cart, a valuable ring and a horse. The failure to disclose these assets constitutes a false oath with intent to deceive for purposes of § 727(a)(4)(A) and, apart from the failure to disclose the corporate assets, is a sufficient ground for denial of discharge. Since the Barnettes failed to

disclose their interests in these assets to their attorney, they of course cannot rely on the defense of erroneous advice of counsel as to the failure to list these assets. It follows that the Barnettes are not entitled to a discharge of their debts because they knowingly made a false oath by signing the petition and schedules which they knew did not accurately reflect their interests in property owned at the time the bankruptcy petition was filed.

A judgment in accordance with this memorandum opinion will be filed contemporaneously herewith.

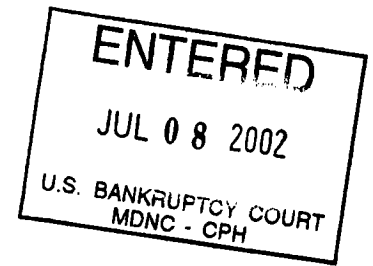
This 1st day of July, 2002.

William L. Stocks

WILLIAM L. STOCKS

United States Bankruptcy Judge

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JUDGMENT

In accordance with the memorandum opinion filed contemporaneously herewith, the relief sought by the plaintiff is granted and Hearsal R. Barnette and Ola E. Barnette are denied a discharge pursuant to § 727(a)(4)(A). -

This 1st day of July, 2002.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge