

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

IN RE:)	
)	
David Alexander Gordon,)	Case No. 98-52426 C-7W
)	
Debtor.)	
_____)	
)	
Edwin H. Ferguson, Jr. as Trustee of the)	
Estate of David Alexander Gordon, Lee)	
F. Booth and Airborne Marketing, Inc.,)	
)	Ad. Proc. No. 99-6036
Plaintiff.)	
vs.)	
)	
David Alexander Gordon.)	
)	
_____ Defendant.)	

ORDER

THIS MATTER came on before the Court for a trial upon the Adversary Proceeding filed by Edwin H. Ferguson, Jr, as Trustee and Lee F. Booth and Airborne Marketing, Inc. ("Plaintiffs") to deny the discharge of David Alexander Gordon ("Debtor" or "Defendant") pursuant to 11 U.S.C. § 727. The Plaintiffs brought this action under § 727 (a)(2) and (a)(4) on the grounds that the Debtor transferred, removed, or concealed property with the intent to defraud creditors and that he knowingly made false oaths in or in connection with this case. The Court, after considering the pleadings, the evidence presented, and the arguments of counsel, makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52, made applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7052.

FINDINGS OF FACT

1. The Debtor filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code on December 31, 1998. At the time of the filing of the petition the Debtor's residence was in foreclosure and numerous civil actions for the repayment of debt had been commenced in state court. Due to his financial situation, the Debtor had been meeting with bankruptcy counsel for several weeks prior to the filing of the petition. The Debtor is a college graduate and is self employed as a commercial pilot.
2. The Debtor's Petition, Schedules and Statement of Financial Affairs contained several deficiencies, including the following:
 - A. The Debtor failed to list ownership of 164 compact discs.
 - B. The Debtor failed to list ownership of a 1983 pair of snow skis with broken bindings.
 - C. The Debtor failed to list ownership of a 1982 VW Rabbit automobile.
 - D. The Debtor failed to list his stock ownership in Gray-Taylor Holdings.
 - E. The Debtor failed to list his interest in unliquidated claims of Gray-Taylor Holding and Alex Gray Graphics for loans made to Airborne Marketing in the amount of \$55,000.
 - F. The Debtor failed to list his one fourth interest in a 1985 Chaparral Model 187 Boat and motor.
 - G. The Debtor failed to list his ownership in a 1985 Yamaha 650 Special motorcycle.
 - H. The Debtor failed to disclose that in November, 1998 he transferred his interest in two Carolina Panther Private Seat Licenses to his brother for the sum of \$4,800.
 - I. The Debtor failed to disclose that in November, 1998 he transferred his interest in a 1967 Cherokee 140 airplane along with various radio and instrument equipment to his father.

3. On October 4, 1999 Edwin H. Ferguson, Jr, as Trustee, and Lee F. Booth and Airborne Marketing, Inc. commenced this adversary proceeding against the Debtor.

4. In November, 1999 the Debtor filed Amended Schedules and Statement of Affairs to reflect the above assets and transfers.

5. The Debtor used the monies from the sale of the Panther seats to pay living expenses, including his mortgage payment.

6. The Debtor did not receive any monies from the transfer of the airplane to his father. At the time of the transfer, the plane was subject to a lien in the amount of approximately \$19,000. No evidence was presented as to the value of the airplane at the time of the transfer. The airplane was sold earlier this year to an independent third party for the sum of \$32,000.

7. Despite having filed Amended Schedules and Statement of Affairs, the Debtor still did not disclose the following:

A. The Debtor's ownership interest in a 1965 offset printing press.

B. The Debtor's ownership interest in a Pontiac Phoenix automobile.

C. The transfer of various office furniture in 1998 to James Wilson for the payment of legal services.

8. The Debtor testified that he made a decision that he should only list bonafide assets and it was his opinion that assets like the old cars and the motorcycle were of limited value. Furthermore, he testified that since he had failed to pay his share of the storage fee for the boat for several years, he felt that he no longer had an interest in the boat. No explanation was given as to why he failed to disclose the transfer of the Panther seats to his brother or the transfer of the airplane to his father.

CONCLUSIONS OF LAW

The primary goal of an individual filing a Chapter 7 bankruptcy petition is to obtain a discharge or a "fresh start." The Bankruptcy Code provides that "the court shall grant the debtor a discharge" unless certain exceptions as set forth in § 727 apply. Creditors, objecting to a debtor's discharge must prove their case by a preponderance of the evidence. Combs v. Richardson, 838 F.2d 112, 116 (4th Cir. 1988) and Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654 (1991). Once the plaintiff makes a *prima facie* case that one of the exceptions to discharge applies, the burden shifts to the debtor to satisfactorily explain why his discharge should not be denied; however, the ultimate burden remains with the party objecting to the discharge. Farouki v. Emirates Bank International, 14 F.3d 244, 251 (4th Cir. 1994). In this case, the Debtor's discharge will be denied if the Plaintiffs are successful under either § 727(a)(2) or (a)(4). In re Shumate, 55 B.R. 489, 495 (Bankr. W.D. Va. 1985). The Debtor contends that, while he initially failed to disclose all of his assets and transfers, he has been forthcoming with the information and has cooperated with the Trustee since the filing of the petition. He further contends that the estate has not been harmed by his non-disclosure.

A bankruptcy discharge is designed to give a fresh start to honest debtors. The evidence showed that the Debtor was cavalier about his duty to report all assets and transfers. The fact that the Debtor thought he should only report "bonafide assets" is meaningless. The Debtor exercised a "reckless disregard of both the serious nature of the information sought and the necessary attention to detail and accuracy in answering" which is the functional equivalent of fraud. Hatten v. Spencer, 204 B.R. 477 (E.D.Va. 1997) (citations omitted). The Debtor knew that his statements and schedules were inaccurate. The Debtor is an intelligent individual who had weeks to prepare for the filing of this petition. In many instances, a debtor will have an emergency

filing because a car has been repossessed and will have little time to review the schedules. This was not the case before the court.

Pursuant to § 727(a)(2) the discharge can be denied if,

the debtor with the intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed.... (A) property of the debtor, within one year before the date of the filing of the petition.

In November, 1998, just one month prior to the filing of the bankruptcy petition, the Debtor made two transfers. The first transfer was for Panther's Stadium Football License Seats. This transfer was to an insider for the sum of \$4,800. No evidence was presented that the price was negotiated as if it was an arm's length transaction. The second transfer was the Debtor's ownership interest in an airplane. While there was an existing lien on the aircraft, the Debtor did not receive a release from the lienholder, no monies were remitted to the Debtor and the transfer was again to an insider.

The Plaintiffs must show that the Debtor had the intent to hinder, delay, or defraud creditors or the Trustee. Intent can be inferred from circumstantial evidence, including conduct by the debtor that is fraught with badges of fraud such as a transfer without consideration, to an insider and concealment. See In re Hooper, 274 B.R. 210 (Bankr. D. S.C. 2001) and In re Mussa, 215 B.R. 158 (Bankr. Ill. 1997). The undisclosed transactions in this case possess badges of fraud sufficient to prove the transfer of property within one year of the filing of the petition with the intent to defraud a creditor or an officer of the estate.

Pursuant to § 727(a)(4) the debtor will not be granted a discharge if the movant can prove by a preponderance of the evidence, that the debtor made a statement under oath that he knew to be false and that the debtor made the statement willfully with the intent to defraud. Williamson v.

Fireman's Fund Inc. Co., 828 F.2d 249, 251 (4th Cir. 1987). For purposes of § 727(a)(4), a false oath sufficient to merit a denial of discharge includes a misrepresentation or an omission in the debtor's bankruptcy schedules or statement of affairs. Huntington Center Partners, Ltd. v. Dupree, 197 B.R. 928, 937 (Bankr. N.D. Ala. 1996). The record is replete with examples of omissions from the Debtor's schedules. The Debtor wrongfully elected to omit numerous assets from his schedules. The fact that the Debtor amended his schedules eleven months after the filing of the petition and one month after the filing of this adversary proceeding does not change the impact of these omissions.

It is undisputed that the Debtor made numerous omissions in his Schedules. The court must now address the issue as to whether the Debtor made the omissions with the intent to defraud. A debtor will rarely admit that they intended to defraud creditors, so intent must be inferred from circumstantial evidence. Here, the Debtor chose to "play fast and loose with [his] assets or with the reality of [his] affairs." Farouki v. Emirates Bank Int'l, Ltd., 14 F.3d 244, 249 (4th Cir. 1994) (quoting In re Tully, 818 F.2d 106, 110 (1st Cir. 1987)). The Debtor's failure to list numerous items of personalty establishes a pattern of omissions sufficient to sustain proof of the necessary fraudulent intent required by § 727(a)(4). There are so many omissions from the Debtor's schedules that intent can be inferred from the Debtor's reckless disregard for the truth. The Debtor was indifferent as to the required disclosures under the Bankruptcy Rules and his failure to recognize the importance of these disclosure requirements is basis for the denial of a discharge. See In re Hatton, 204 B.R. 477,484 (E.D.Va. 1997); In re Dupree, 197 B.R. 928, 938 (Bankr. N.D. Ala. 1996); In re Johnson, 193 B.R. 163, 170 (Bankr. E.D. Va 1992).

The law in the Fourth Circuit requires that the false oath must relate to a material matter. Williamson v. Fireman's Fund Ins. Co., 828 Fed 248, 251. (4th Cir 1987). The Debtor argues that

the assets were of no meaningful value. The fact that stock may have been worthless at the time of filing is irrelevant to disposition under § 727(a)(4). Farouki, 14 F.3d at 251 (citing In re Chalik, 748 F.2d 616 (11th Cir. 1984)(false oaths regarding worthless assets can constitute material omissions)). The Court finds that the multiple omissions affected the ability of the Trustee to administer this case and constitute material matters.

The Court concludes that the Debtor has shown a reckless indifference to the disclosure requirements of the bankruptcy code. While the Debtor has cooperated with the Trustee since the filing of the petition, it does not excuse his failure to truthfully answer the questions presented in his Schedules and Statement of Affairs. This is not an instance in which one or two assets were omitted or the Debtor failed to disclose a transfer. These were not harmless mistakes. It is not as if the Debtor “forgot” that he had transferred an airplane to his father. The Debtor made a deliberate and conscious decision not to fully disclose all of his assets or his transactions within one year of the filing.

Accordingly, it is ORDERED, ADJUDGED, AND DECREED that the Debtor, David Alexander Gordon, is denied a discharge under 11 U.S.C. § 727.

This the 8 day of May 2002.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge