

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: )  
)  
ELMER R. BAILEY, ) Bankruptcy Case No. 97-60112  
)  
Debtor. )  
\_\_\_\_\_)  
)  
RONALD K. BAILEY and )  
HERSHEL KASTEN, )  
Plaintiffs, )  
)  
vs. ) Adversary Case No. 97-6016  
)  
ELMER R. BAILEY, )  
)  
Defendant. )

OPINION

This matter having come before the Court on a Motion for Summary Judgment filed by Defendant, Elmer R. Bailey, and a Response thereto filed by the Plaintiffs; the Court, having reviewed said Motion, Affidavits, depositions, pleadings, and the Response to said Motion and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

The genesis of this case dates back to a time long before the bankruptcy petition was filed by the Debtor/Defendant herein. The principal parties in this adversary are brothers who were engaged in the timber business together on and off for a period of in excess of 35 years. According to the Plaintiff, Ronald K. Bailey, they were most recently engaged in the timber business as "partners" from 1990 until sometime

in 1993. Following a disagreement, the parties went their separate ways, and the principal plaintiff in this adversary, Ronald K. Bailey, sued Debtor/Defendant, Elmer R. Bailey, in State Court. The State Court case proceeded through a series of hearings and depositions until the eve of trial when the Defendant filed the instant Chapter 7 proceeding, seeking to discharge debts allegedly owed to the Plaintiffs herein.

Shortly after the filing of the instant Chapter 7 proceeding, a Rule 2004 examination was conducted by the Plaintiffs of the Debtor/Defendant, and the instant adversary proceeding was filed as a two-count Complaint, which was subsequently amended, on August 8, 1997, by the filing of a Second Amended Complaint Objecting to Discharge and to Declare Debt Non-Dischargeable. The Second Amended Complaint consists of three counts, two being under 11 U.S.C. § 727 and one being under 11 U.S.C. § 523. Thereafter, various motions were filed and heard, including a Motion to Dismiss, Request for Contempt Findings, and motions dealing with discovery and other problems between the parties to this proceeding. Throughout the various hearings held in this matter, the Court notes that, while the parties were well prepared and well versed in the facts of the case and the law, the Court has come to recognize that this case is nothing more than an old family feud. This has been an unusual case from the very beginning, given the extensive and detailed detective work that has been done and the depth of the ill will apparent between the parties. There have been allegations of name calling, face making, and disagreements over wholly insignificant matters, including small repair bills and a hidden safe deposit box that ended up containing nothing more than an old pocket watch, their Mother's Will, and their father's straight razor. The further the Court has delved into this case, the more apparent it has become that the objections and matters raised by the Plaintiffs have little, if any, significance, let alone rise to the level to support an objection to the Debtor/Defendant's discharge or the dischargeability of any debt owed to the Plaintiffs.

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria

set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

[T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed.R.Civ.P. 56(c); See: Donald v. Polk County, 836 F.2d 376, 378-379 (7th Cir. 1988).

The United States Supreme Court has issued a series of cases which encourage the use of summary judgment as a means of disposing of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986). "The primary purpose for granting a motion for summary judgment is to avoid unnecessary trials when there is no genuine issue of material fact in dispute." Farriss v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmens Federal Savings & Loan Ass'n., 806 F.2d 146, 149 (7th Cir. 1986). The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 256, 106 S.Ct. at 2514. There is no genuine issue of material fact for trial if the record, taken as a whole, does not lead a rational trier of fact to find for the nonmoving party. Matsushita, 475 U.S. at 587, 106 S.Ct. at 1356. "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-250, 106 S.Ct. at 2511.

Once the motion is supported by a *prima facie* showing that the moving party is entitled to judgment as a matter of law, a party opposing the motion may not rest upon the mere allegations or denials in its pleadings; rather its response must show that there is a genuine issue for trial. Anderson, 477 U.S.

at 248, 106 S.Ct. at 2510; Celotex, 477 U.S. at 323, 106 S.Ct. at 2552-53; Matsushita, 475 U.S. at 587, 106 S.Ct. at 1356; Patrick v. Jasper County, 901 F.2d 561, 564-566 (7th Cir. 1990). All reasonable inferences to be drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Davis v. City of Chicago, 841 F.2d 186, 189 (7th Cir. 1988). Furthermore, the existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under the applicable law. Donald v. Polk Co., 836 F.2d at 379; Wallace v. Greer, 821 F.2d 1274, 1276 (7th Cir. 1987).

Count I of the Plaintiffs' Second Amended Complaint alleges, pursuant to 11 U.S.C. § 727(a)(3), that the Debtor/Defendant's discharge in bankruptcy should be denied in that he failed to maintain appropriate records and documentation from which his financial condition and business transactions might be ascertained. Title 11 U.S.C. § 727(a)(3) states:

(a) The court shall grant the debtor a discharge, unless -

(3) the 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;

Consistent with the "fresh start" policy underlying the Bankruptcy Code, the exception to discharge under § 727(a)(3) should be construed strictly against the creditor and liberally in favor of the debtor. It is also important, however, to recognize that a discharge in bankruptcy is a privilege, not a right, and should only inure to the benefit of the honest debtor. See: In re Juzwiak, 89 F.3d 424 (7th Cir. 1996). It has been consistently held that sophisticated business persons are generally held to a higher level of accountability for record keeping than are less experienced debtors. See: Meridian Bank v. Alten, 958 F.2d 1226 (3rd Cir. 1992); Bartolotta v. Lutz, 485 F.2d 227 (5th Cir. 1973); In re Redfeam, 29 B.R. 739

(Bankr. E.D. Texas 1983); and In re Cromer, 214 B.R. 86 (Bankr. E.D. New York 1997). A debtor's failure to keep and maintain books and records must be determined in light of the circumstances. It has been found, where an unsophisticated wage earner is dealing primarily in cash, that that individual should not be denied a discharge because he failed to keep ledger books and accounts that would be required of someone who was a sophisticated business person dealing with a complex business situation. See: Meridian Bank v. Alten, supra, at 1226; and In re Cromer, supra, at 86.

In considering the undisputed facts in the instant case under the criteria of § 727(a)(3), the Court must conclude that there has been no violation of 11 U.S.C. § 727(a)(3) such that the Debtor's discharge should be denied. The Court can find no indication whatsoever in this matter that the Debtor/Defendant has in any way concealed, destroyed, mutilated, or falsified any records. Thus, the only possibility of rejecting the Debtor's discharge under § 727(a)(3) must be found in a failure to keep or preserve recorded information, including books, documents, records, and other information from which the Debtor's financial condition or business transactions might be ascertained. The Debtor/Defendant in the instant case is not a sophisticated businessman, and his business dealings appear to be confined to his local, rural community. Moreover, the Court finds that the Debtor's business operation is very simple and uncomplicated. He is a self-employed individual having no employees other than his son, who he has paid on an independent contract basis from time to time. The record clearly reflects that the Debtor has produced copies of his bank statements, canceled checks, income tax returns, and summaries of his income and expenses which were attached to his tax returns. The record further reflects that, during the time period of which the Plaintiffs complain, the Debtor filed timely income tax returns and was audited by the Internal Revenue Service, and his records held up to the Internal Revenue Services review. The Debtor's records consist mainly of canceled checks and bank statements and certain receipts and bills related to his business.

Although it is clear that the Debtor/Defendant did not prepare a general ledger or any type of a business account throughout the years, there is no requirement under the law that he do so. In fact, the Debtor's testimony indicates that he did not even know how to prepare a general ledger or an accounting in a form that would be required of a more sophisticated businessman. All in all, the Court finds that the Debtor/Defendant has supplied sufficient information from which the creditors of the Debtor could determine his financial condition and the status of his business transactions, such as to satisfy the requirements of 11 U.S.C. § 727(a)(3) and the cases interpreting that section.

Count II of the Plaintiffs' Second Amended Complaint alleges that the Debtor/Defendant breached a fiduciary duty owing to the Plaintiffs pursuant to 11 U.S.C. § 523(a)(4). As for Plaintiff, Hershel Kasten, the record is totally devoid of any fiduciary relationship existing between the Debtor/Defendant and Mr. Kasten. As for Plaintiff, Ronald K. Bailey, the Court finds that the undisputed facts in the record fail to suggest that the Debtor/Defendant was in any way a fiduciary within the meaning of § 523(a)(4). Although Plaintiff, Ronald K. Bailey, asserts that he and the Debtor/Defendant were "partners," there is no evidence to support this assertion. The parties did not maintain a partnership bank account. They did not maintain a joint checking or savings or operating account. Each party kept their own funds until they "settled up." The evidence before the Court indicates that Plaintiff, Ronald K. Bailey, and the Debtor/Defendant were nothing more than joint venturers. If there was any type of partnership involved between these two parties, it was entirely an oral partnership that was without any defined duties, roles, or responsibilities of the parties. If there was any trust relationship between these parties, it would have arisen only when one of the parties derived a profit without the consent of the other party, and such a trust would have been an implied or a constructive trust. Under the applicable law, such a trust is not sufficient to invoke the dischargeability provisions of 11 U.S.C. § 523(a)(4).

The applicable law under 11 U.S.C. § 523(a)(4) has been clearly stated by the Seventh Circuit Court of Appeals in two fairly recent decisions: In re Marchiando 13 F.3d 1111 (7th Cir. 1994) and In re Woldman, 92 F.3d 546 (7th Cir. 1996). In reviewing these two cases, the Court finds that any trust relationship that might have existed between Plaintiff, Ronald K. Bailey, and the Debtor/Defendant in this case fails to rise to the level required by the Seventh Circuit. The Seventh Circuit clearly states, in Marchiando, that § 523(a)(4) reaches only those fiduciary obligations in which there is substantial inequality and power or knowledge in favor of the debtor seeking the discharge and against the creditor resisting discharge, and does not reach "a trust that has a purely nominal existence until the wrong is committed." See: Marchiando, *supra*, at 1116. As stated above, the Court finds that the only trust relationship that could have arisen under the undisputed facts before the Court would have been an implied or constructive trust which is insufficient to invoke a non-dischargeability action under § 523(a)(4). See: Davis v. Aetna Acceptance Company, 293 U.S. 324 (1934), and In re Long, 774 F.2d 875, at 878 (8th Cir. 1985). The requisite fiduciary or trust relationship must exist prior to the creation of the debt and not because of it. See: Davis, *supra*, at 333, and In re Cochrane, 179 B.R. 628, at 632 (Bankr. D. Minn. 1995) affirmed at 124 F.3d 978 (8th Cir. 1997).

Finally, the Court addresses the third Count of the Plaintiffs' Second Amended Complaint wherein it is alleged that the Debtor/Defendant's discharge in bankruptcy should be denied pursuant to 11 U.S.C. § 727(a)(4)(A), which states:

- (a) The court shall grant the debtor a discharge, unless -
  - (4) the debtor knowingly and fraudulently, in or in connection with the case -
    - (A) made a false oath or account;

The basis for Count III of the Complaint is that the Debtor/Defendant failed to list a certain executory contract as property of the estate, that the Debtor failed to list his ownership interest in a certain safety deposit box, and that the Debtor/Defendant undervalued various pieces of equipment in his possession with the knowing intent to defraud his creditors in bankruptcy.

In reviewing Count III of the Plaintiffs' Second Amended Complaint, the Court first notes that it originally determined that Count III was timely filed as is required by Rule 4004(a) of the Federal Rules of Bankruptcy Procedure; however, upon reconsideration, it finds that was in error. Although the Plaintiffs did file a timely Complaint under § 727(a)(3) of the Code, the Court now finds that the amendment to the Plaintiffs' original Complaint, adding Count III under 11 U.S.C. § 727(a)(4)(A), was made and filed following the deadline for objections to discharge under § 727. Pursuant to Rule 15(c) of the Federal Rules of Civil Procedure:

An amendment of a pleading may relate back to the date of the original pleading when the claim . . . in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading.

Once the limitation period has expired, a creditor is jurisdictionally barred from asserting an objection to discharge.

In re Ham, 174 B.R. 104 (Bankr. S.D. Ill. 1994). The Court further finds that it is clear that no party may amend a prior complaint to raise new objections to discharge not fairly raised by a complaint filed prior to the deadline. See: Para. 4004.02(3), Collier on Bankruptcy, 15th Ed. (Revised 1997). Courts that have examined this issue have found that there must be a nexus between the facts of the amended objection to discharge and an objection originally pleaded within the relevant time period in order for the amended objection to relate back to the time of the original filing. See: In re Ham, supra, at 107; and In re Biederman, 165 B.R. 783, at 792 (Bankr. D. N.J. 1994). In reviewing the facts of the instant case, the

Court finds that there is not a sufficient nexus between the facts alleged in Count III of the Plaintiffs' Second Amended Complaint and Count I, which was timely filed, in order to find that Count III relates back to the time of the filing of the Plaintiffs' original Complaint. Thus, the Court must find in favor of the Debtor/Defendant on his Motion for Summary Judgment and deny Count III of the Plaintiffs' Second Amended Complaint.

Even were the Court to find that Count III of the Plaintiffs' Second Amended Complaint was filed timely, the Court would still rule in favor of the Debtor/Defendant based upon the undisputed facts. Under § 727(a)(4)(A), Plaintiffs must show that the Debtor took actions to make a false oath with the knowing intent to defraud or, in such a reckless manner as to justify a finding that the Debtor/Defendant acted fraudulently. In re Potter, 88 B.R. 843 (Bankr. N.D. Ill. 1988); In re Agnew, 818 F.2d 1284 (7th Cir. 1987). Additionally, a false oath under 11 U.S.C. § 727(a)(4)(A) must relate to a material matter before it can affect a debtor's discharge. See: In re Agnew, supra, at 1284; and In re Calisoff, 92 B.R. 346 (Bankr. N.D. Ill. 1988). Courts that have examined the question of what a "material" matter is have consistently held that the subject matter of a false oath is "material" and thus sufficient to bar discharge in bankruptcy if the matter bears a relationship to debtor's business transactions or estate or concerns discovery of assets, business dealings, or existence and disposition of his property. In re Chalik, 748 F.2d 616 (11th Cir. 1984). It has also been held that a matter is "material" for the purposes of § 727(a)(4), where it can be found that the matter or failure to disclose that matter hinders administration of the bankruptcy estate. See: In re Calisoff, supra, at 355.

In the instant case, the Court finds that the matters complained of by the Plaintiffs are wholly immaterial and can best be summed up by the last line of a letter from Trustee Donald Hoagland to the parties' attorneys in which he stated: "I hope you gentlemen can find other tasks to spend your time, but

in the future, I would appreciate not being sent to waste a day on a wild goose chase." As stated above, one of the matters which the Plaintiffs complained of was a safe deposit box which had not been reported on the Debtor's schedules. When opened by the Trustee, the box revealed nothing more than an old pocket watch, the Will of the mother of Elmer and Ronald Bailey, and their father's straight razor. Additionally, Plaintiffs had contended that the Debtor/Defendant significantly undervalued certain equipment and had failed to disclose certain equipment. After extensive examination and detective work, it has become apparent that the matters of which the Plaintiffs complain consist of essentially worthless junk. The Plaintiffs also complain that the Debtor/Defendant failed to schedule an executory contract that he had entered into pre-petition to harvest timber. In examining this "contract," the Court finds that it was a wholly unenforceable piece of paper, and there is nothing in the record to indicate that the Debtor/Defendant was in any way acting with fraudulent intent or in reckless disregard of the truth, such that a finding that the Debtor/Defendant acted fraudulently could be justified. Thus, based upon the Court's finding that the matters complained of by the Plaintiffs are not material and that there is no indication that the Debtor/Defendant acted with fraudulent intent or reckless disregard of the truth, the Court finds it appropriate to find the Debtor/Defendant's Motion for Summary Judgment and to deny Count III of the Plaintiffs' Complaint.

ENTERED: January 29, 1998.

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GERALD D. FINES  
United States Bankruptcy Judge