

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 to Supplement Record and a Motion to Amend Complaint filed by the Plaintiffs; the Court, having heard arguments of counsel 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 Court will first address the Motion to Supplement the Record filed by the Plaintiffs in which they seek to have certain financial statements given by the Debtor to Boatmen's Bank made a part of the record in this adversary proceeding. On January 29, 1998, the Court issued an Opinion in which it allowed a Motion for Summary Judgment filed by the Defendant and denied Counts I, II, and III of the Plaintiffs' Second Amended Complaint. At this time, the Plaintiffs seek to have certain financial statements from 1995

and 1996, made by the Debtor, included as a part of the record in conjunction with the Court's ruling on the Motion for Summary Judgment. These financial statements were produced by Boatmen's Bank in response to an Order requiring the Bank to produce various financial documents in conjunction with an Objection to Claim which the Plaintiffs filed in Debtor's bankruptcy case file.

In reviewing the Motion to Supplement the Record and the arguments of counsel, the Court finds that, while it is appropriate to allow the Motion so that the Plaintiffs may have a complete record for any appeal which they might wish to pursue, it is clear that the financial statements which the Plaintiffs seek to introduce into the record do not change the Court's ruling on the Motion for Summary Judgment.

The financial statements in question were made by the Debtor in 1995 and 1996, prior to his filing the Chapter 7 bankruptcy herein. The Plaintiffs assert that these financial statements show, in particular as to Count III of the Second Amended Complaint, that the Debtor was guilty of making a false oath on his bankruptcy schedules in that the financial statements show that the Debtor valued certain equipment and real estate at a much higher level than was stated in his bankruptcy schedules. While the Court would agree that these financial statements might indicate that the Debtor was less than honest with Boatmen's Bank, they do not show that there was a false oath in the Debtor's bankruptcy petition. Since the filing of the instant adversary proceeding, there have been substantial inquiries and investigations made as to the Debtor's financial condition, both by the Plaintiffs and by the Trustee in Bankruptcy. All of these investigations show that the statements made by the Debtor on his bankruptcy petition as to the value of his assets were reasonable and accurate to a degree that the Court is unable to find any indicia of fraud on the part of the Debtor in filling out his schedules and in his testimony before the Trustee and this Court. The Court also notes that, in its Opinion on the Defendant's Motion for Summary Judgment, it found that Count III of the Plaintiffs' Second Amended Complaint was not timely filed. As such, it has addressed the issue

of these financial statements for the sake of argument only.

The Court has also considered whether the financial statements in question bear any relationship to Counts I and II of the Plaintiffs' Second Amended Complaint, and, in so doing, finds that said financial statements add nothing to the Plaintiffs' evidence which would cause the Court to reverse its judgment in favor of the Defendant as to Counts I and II of the Second Amended Complaint. However, the Court does find that the Plaintiffs are entitled to include these financial statements as a part of the record herein as there is no prejudice to the Defendant and the inclusion of these statements serve to complete the record for the purpose of any appeal which the Plaintiffs might wish to pursue.

Next, the Court addresses the Motion to Amend Complaint filed by the Plaintiffs on January 29, 1998, in which the Plaintiffs seek to amend their complaint by restating Count III of the Second Amended Complaint as a fourth count, including a prayer for relief for revocation of the Debtor's discharge pursuant to 11 U.S.C. § 727(d). Amendments to complaints are governed by Rule 7015 of the Federal Rules of Bankruptcy Procedure which makes applicable Rule 15 of the Federal Rules of Civil Procedure, which states at paragraph (a) that:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Allowance of amendments lie within the sound discretion of the trial court and refusal to permit amendment is not subject to review on appeal except for abuse of discretion. Komie v. Buehler Corp., 449 F.2d 644 (9th Cir. 1971). Nevertheless, Courts are generally required to allow amendments freely and refusal should be based on some valid ground, such as that the party has not offered the amendment in good faith or that it will result in some prejudice.

In addressing the present Motion to Amend Complaint to add a count seeking revocation of the Debtor's discharge under 11 U.S.C. § 727(d), the Court finds that, although the Motion to Amend Complaint does not clearly state under what section of 727(d) it is brought, a reading of the statute makes it clear that only § 727(d)(1) would apply in this instance as there are no allegations in either the Second Amended Complaint or in the Motion to Amend Complaint which would make applicable either §§ 727(d)(2) or 727(d)(3). As such, the Court will limit its discussion to the provision relating to revocation of a debtor's discharge under § 727(d)(1).

Section 727(d)(1) provides that a court may revoke the discharge if it "was obtained through the fraud of the debtor." The fraud required to be shown is fraud in fact, Donovan v. LaPorta, 26 B.R. 687 (Bankr. N.D. Ill. 1982), such as the intentional omission of assets from the debtor's schedules. The fraud required to be shown must involve intentional wrong and does not include implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality. In re Orenduff, 226 F.Supp. 312 (Dist. Ct. Okla. 1964). Further, § 727(d)(1) requires that the requesting party not know of the fraud until after the granting of the discharge. This is essential. In re Bowman, 173 B.R. 922 (9th Cir. BAP 1994); Continental Builders v. McElmurry, 23 B.R. 533 (W.D. Mo. 1982). The process of revocation is restricted to those frauds that are discovered after the discharge. See: In re Bowman, supra, at 922; and In re Emery, 170 B.R. 777 (Bankr. E.D. N.Y. 1994). If it were not for this restriction, a complaint for revocation would be equivalent to a retrial before appeal. Thus, a party requesting a revocation of a discharge has the burden of proving its lack of knowledge of the fraud before discharge and failure to carry this burden is fatal to the party's case. It has been consistently held that the fraud necessary to revoke a discharge is post-petition fraud on the Court or upon the entire creditor body. Pre-petition fraud committed upon only a single creditor will not suffice to revoke the discharge. See: In re Emery, supra, at 782. It

has further been held that a Chapter 7 debtor's discharge will not be revoked, despite evidence that it was obtained by fraud, where the creditor seeking revocation suspected fraud prior to the discharge date, but did not object or seek extension from the court in the time within it could object to discharge. In re Emery, supra, at 785.

In applying 11 U.S.C. § 727(d)(1) and the cases interpreting that section to the instant adversary proceeding, the Court finds that it is clear that the Plaintiffs in this action not only suspected fraud prior to the date of the Debtor's discharge, but that they also filed a complaint objecting to the discharge prior to the deadline for filing complaints under 11 U.S.C. § 727(a). The Court further finds that the Plaintiffs' proof is wholly lacking as to a showing that the Plaintiffs had no knowledge of fraud prior to the deadline for filing discharge complaints under 11 U.S.C. § 727(a). As such, the Court must conclude that the Motion to Amend Complaint filed on January 29, 1998, must be denied. Such an amendment would not only be prejudicial to the Defendant, but it would also fall outside of the scope of 11 U.S.C. § 727(d)(1) and the clear meaning of that section as interpreted by the cases cited herein.

ENTERED: February 6, 1998.

GERALD D. FINES
United States Bankruptcy Judge