

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

IN RE:)	
)	
JACK EUGENE FOWLER,)	Bankruptcy Case No. 94-40711
)	
Debtor.)	
_____))	
)	
DAVID CLARK, d/b/a CLARK FARMS,)	
)	
Plaintiff,)	
)	
vs.)	Adversary Case No. 95-4019
)	
JACK EUGENE FOWLER,)	
)	
Defendant.)	
)	
and)	
)	
IN RE:)	
)	
JOHN ROBERT FOWLER,)	Bankruptcy Case No. 94-40710
)	
Debtor.)	
_____))	
)	
DAVID CLARK, d/b/a CLARK FARMS,)	
)	
Plaintiff,)	
)	
vs.)	Adversary Case No. 95-4020
)	
JOHN ROBERT FOWLER,)	
)	
Defendant.)	

OPINION

The above-captioned adversary proceedings were consolidated for trial by agreement of the parties, and a trial was held on July 31, 1995. The Court, having heard sworn testimony and 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 Debtors/Defendants in the above-captioned proceedings are father and son, with Jack being the father and John

being the son. Together the Fowlers operated a grain and livestock operation with Jack being primarily responsible for the grain farming and John being primarily responsible for the livestock operation. The evidence indicated that both father and son helped each other out in the areas of their primary and secondary responsibilities and that the farming operation was operated in a loose joint venture. It is apparent that, by January 1994, the Debtors were suffering financial difficulties and that they sought the counsel of Attorney Doug Antonik for advice as to their options of dealing with their mounting debt load. The evidence indicates that the Debtors met with Attorney Antonik, in January 1994, at which time they discussed their options and, although bankruptcy was discussed, it is apparent that the Debtors decided to attempt to work their way out of their problems rather than file bankruptcy after their initial meeting with Attorney Antonik in January 1994. The Debtors continued operating their livestock and grain farm through the Summer of 1994, but their financial condition did not improve. In August 1994, the Debtors again met with Attorney Antonik and decided that it was in their best interest to file Chapter 7 bankruptcies. Both Debtors hired Attorney Antonik to file their respective Chapter 7 petitions and, on September 20, 1994, the Debtors petitions were filed and given consecutive bankruptcy numbers.

On February 13, 1995, the Plaintiff herein filed an adversary proceeding in each of the Debtors' bankruptcy cases alleging that the Debtors should be denied a discharge pursuant to various provisions of 11 U.S.C. § 727. For clarity, the Court will discuss the various allegations raised by the Plaintiff first as to Jack Fowler, in Adversary No. 95-4019, and then as to John Fowler, in Adversary No. 95-4020. The Plaintiff bears the burden of proof for each of his allegations under § 727 by a preponderance of the evidence. Grogan v. Garner, 111 S.Ct. 654 (1991).

Prior to discussing each of the individual allegations made by the Plaintiff under 11 U.S.C. § 727, the Court first finds it appropriate to comment upon the credibility of the witnesses herein. The Court finds that all of the witnesses that testified at hearing, both for the Plaintiff and for the Defendants, were credible witnesses. The Court recognizes that the Plaintiff made numerous attempts to impeach the credibility of both the Defendants, John and Jack Fowler, and also Mrs. Fowler. However, upon reviewing the inconsistencies raised by the Plaintiff in the Defendants' testimony, the Court finds that, when taken in context, these inconsistencies were relatively minor, and, in general, the Court found that the Defendants' testimony, together with the testimony of Mrs. Nancy Fowler, was credible. The Court had the opportunity to observe the demeanor of the witnesses and to observe how the witnesses answered questions and how those questions and answers related to other matters in the trial. Having done so, the Court must find that, in all, the testimony offered by the Defendants was not only credible but was plausible.

In considering the Complaints in this matter, the Court first turns to the Complaint of the Plaintiff against Defendant, Jack

Fowler. For his first allegation that discharge should be denied, the Plaintiff alleges that the Defendant, Jack Fowler, knowingly and fraudulently, in connection with this Chapter 7 case, made certain false oaths. Pursuant to 11 U.S.C. § 727(a)(4), the Plaintiff must prove by a preponderance of the evidence that the Defendant made false oaths or statements which the Defendant knew were false and that said oaths or statements were made willfully with the intent to defraud. In re Agnew, 818 F.2d 1284 (7th Cir. 1987); In re Bailey, 147 B.R. 157 (Bankr. N.D. Ill. 1992). The Debtor's actions must be taken with knowing intent to defraud trustee or a creditor or taken so recklessly as to justify a finding that the Debtor acted fraudulently. See: In re Potter, 88 B.R. 843 (Bankr. N.D. Ill. 1988). A false oath under § 727(a)(4)(A) must relate to a material matter before it can affect a debtor's discharge. In re Calisoff, 92 B.R. 346, and In re Agnew, supra, at 1284. The test for materiality is whether the false oath bears a relationship to the debtor's business transactions or estate or concerns the discovery of assets, business dealings, or the existence and disposition of a debtor's property. See: In re Bailey, supra, at 162. First, under § 727(a)(4), the Plaintiff alleges that the Debtor made a false oath in not listing various banking accounts on his bankruptcy schedules that he owned at the time of the filing of the bankruptcy petition. In considering the testimony concerning this allegation, the Court finds that the Defendant, Jack Fowler, was not very sophisticated in financial affairs. In fact, the evidence indicates that the Defendant's wife, Nancy Fowler, took care of most of the financial business of the Defendant and that the Defendant had only a bare-bones understanding of his personal financial affairs. The Court found the Defendant's explanation to be credible that he misunderstood the questions posed in the bankruptcy schedules concerning financial accounts and that he listed the money he had in his various banking accounts as cash on hand rather than listing the accounts individually. All in all, the Court must find that, as for this allegation, the Plaintiff has failed to show that the Debtor acted with any fraudulent intent. The banking accounts in question were disclosed fully once the Debtor/Defendant recognized that they had been erroneously omitted from the bankruptcy schedules. As such, the Court must find that the Plaintiff has failed to meet his burden of proof on the element of fraudulent intent.

Next, the Plaintiff alleges that the Defendant was guilty of making a false oath because he omitted listing the Plaintiff, David Clark, as a creditor on his bankruptcy schedules, even though he knew that David Clark was a creditor at the time of filing his bankruptcy petition. As for this omission, the Court finds that the explanation afforded by the Defendant, that he and his son operated their operation together, but that his son was primarily responsible for the livestock operation of which David Clark was a creditor, is not only logical but plausible. The Court finds that, in looking at both bankruptcy petitions of the Defendants herein as a whole, the debt to David Clark is listed on the petition of John Fowler. Given that it was John Fowler's primary responsibility to operate the livestock portion of the Debtors' farming operation, it makes sense that the debt to David Clark, which was a debt

created by the livestock operation, would be on the bankruptcy petition of John Fowler. As such, the Court must again find that there was no fraudulent intent on the part of the Defendant in failing to list the debt of David Clark in that the debt was duly listed in the bankruptcy schedules of John Fowler, even though it is clear that the Plaintiff was also a creditor of Defendant, Jack Fowler, given the joint nature of the farming operation between he and his son.

Under § 727(a)(4)(A), the Plaintiff further alleges that the Defendant, Jack Fowler, has made a false oath in that he did not list any livestock on his bankruptcy schedules, nor did he disclose the fact that he was operating or had an interest in a joint venture or a partnership. As for these allegations, the Court again must find that, given the testimony of the Defendants, it is unable to find that these omissions or non-disclosures were as the result of some fraudulent intent on the part of Jack Fowler. As set forth above, Jack Fowler believed that his son was responsible for operating the livestock operation, and, therefore, all debts and information concerning the livestock operation were listed on the bankruptcy petition of John Robert Fowler, which was filed on the same day as the petition of the Defendant, Jack Eugene Fowler. As such, the Court is unable to find that a fraudulent false oath has been shown which would rise to the level to deny the Defendant a discharge in this instance.

For his next basis that the Defendant should be denied a discharge, the Plaintiff alleges, pursuant to 11 U.S.C. § 727(a)(2)(A), that the Debtor, with the intent to hinder, delay, or defraud a creditor, withdrew \$5,500 in cash from a bank account and concealed said assets from the Court and from creditors. The Plaintiff also alleges, under § 727(a)(2)(A), that the Defendant sold certain livestock in August 1994 and paid the proceeds to a bank which had no lien on said livestock when the Defendant had promised the Plaintiff that the Plaintiff would be paid from the sale of the livestock and that said promise had caused the Plaintiff to forebear from acting to collect the debt due Plaintiff. Pursuant to 11 U.S.C. § 727(a)(2)(A), a debtor must be denied a discharge where it is found that the debtor, within one year before the date of filing bankruptcy with intent to hinder, delay, or defraud a creditor or an officer of the estate has transferred, removed, destroyed, mutilated, or concealed property of the debtor. Here again, the burden of proof is upon the Plaintiff to establish the elements of § 727(a)(2)(A) by a preponderance of the evidence. See: Grogan, supra. The Court must find that the Defendant acted with actual intent requiring a showing of extrinsic evidence suggesting that fraud exists. In re Smiley, 864 F.2d 562 (7th Cir. 1989). As for the allegation that the Defendant withdrew \$5,500 in cash from a bank account with the intent to hinder, delay, or defraud a creditor, the Court finds that the Defendant has offered adequate explanation of where the proceeds that were taken from the bank account went. It is clear that, at the time the money was taken from the bank account, on or about August 22, 1994, the Defendant was in dire financial straits. There was obviously no profit being made from the Debtors' farming operation, and it is apparent that the Debtor did not have enough income to meet

normal living expenses. The testimony of the Defendant and of the Defendant's wife, Nancy Fowler, indicated that the money was taken and was used to pay various bills among which was the bill of the Debtor's attorney for a retainer in both the bankruptcy cases of Jack Fowler and John Fowler in the amount of \$2,000. The Debtor/Defendant and his wife offered other explanations as to where the money was spent, and the Court finds that these explanations were adequate. All in all, the Court finds that there simply was no showing that the Debtors removed this cash with a fraudulent intent to hinder, delay, or defraud any creditor. It is apparent from the facts that the money was needed to pay living expenses and to pay certain bills and that the money was used in no way to create a windfall for the Defendant. As an additional allegation under § 727(a)(2)(A), the Plaintiff alleges that, with an intent to hinder, delay, or defraud the Plaintiff, the Defendant sold certain livestock in August 1994, and paid the proceeds of that livestock to a bank which had no lien on the livestock even though the Defendant had promised to pay the proceeds of said sale to the Plaintiff for a mounting debt for livestock feed and supplies. In reviewing the testimony on this matter, the Court finds that the transaction complained of by the Plaintiff simply does not fit under 11 U.S.C. § 727(a)(2)(A) in that there has been no showing that the Defendant acted with a fraudulent intent as to this transaction. The evidence is clear that the Plaintiff herein was an unsecured creditor having no lien in the livestock which was sold and, even though it may have been inappropriate for the Defendant to have continued to promise payment, a mere promise to pay is not in and of itself proof of fraudulent intent. The evidence indicates that, during the Summer of 1994, the Defendant was hopeful that he could turn his farming operation around. The Court finds that the continued promises to pay the Plaintiff from the sale of livestock in August 1994 by the Defendant were not fraudulent in that it is apparent that the Debtor was hopeful that he could pay; however, his financial situation deteriorated to a point that he simply was unable to pay the debt in question to the Plaintiff in light of other demands. The Plaintiff makes much of the fact that the proceeds of the August 1994 livestock sale were paid to the Peoples National Bank, a bank whose president employed the Defendant's wife, Nancy Fowler. However, upon examining the testimony, it is apparent that the Debtor's wife was merely a housecleaner for the bank president's wife, and there was no showing that there was any type of a relationship between the Defendant's wife and the bank president to give rise to an inference that there was a fraudulent intent to prefer the Peoples National Bank over the Plaintiff herein.

In sum, the Court finds that, while the Defendant's business transactions during the Summer of 1994 were anything but wise, the Plaintiff has failed to show that the Defendant was acting with a fraudulent intent. Rather, the evidence shows that the Defendant was involved in an ever-increasing struggle to keep his head above water and, being financially unsophisticated, made additional unwise decisions as a result of the confused state of his business and financial dealings.

Pursuant to 11 U.S.C. § 727(a)(5), the Plaintiff has also alleged that the Debtor failed to adequately explain a loss or deficiency of his assets concerning the \$5,500 in cash which was withdrawn from certain of the Defendant's bank accounts on August 22, 1994. Under 11 U.S.C. § 727(a)(5), the Plaintiff has the burden of proof by a preponderance of the evidence to introduce evidence that there has been a disappearance of substantial assets or of unusual transactions on the part of the Debtor. Once this burden is satisfied, the burden then shifts to the Defendant to satisfactorily explain the loss or deficiency of assets. 4 Collier on Bankruptcy § 727.08 (15th ed. 1989). The majority of the cases interpreting § 727(a)(5) do not require that the explanation be meritorious. See: Great American Insurance Company v. Nye, 64 B.R. 759, at 762 (Bankr. E.D. N.C. 1986); In re Silverstein, 151 B.R. 657 (Bankr. E.D. N.Y. 1993); and In re Zell, 108 B.R. 615 (Bankr. S.D. Ohio 1989). The Court in Nye, supra, stated: "The Court need only decide whether the explanation satisfactorily describes what happened to the assets, not whether what happened to the assets was proper." As such, the Court's inquiry is limited to whether the Debtor has made a satisfactory explanation for the loss or deficiency of the assets at issue. These determinations are questions of fact. In re Chalik, 748 F.2d 616 (11th Cir. 1984). In this case, the Court finds that the Defendant has reasonably explained what happened to the cash which was withdrawn from certain of his bank accounts on or about August 22, 1994. As mentioned above, the Debtor may have made some unwise decisions concerning the withdrawal of cash and concerning the payment of various creditors. However, the Court is not, in this instance, concerned with whether the explanation of the loss of the money was proper, but whether the explanation is reasonable and credible. The Court is content as to what happened to the cash withdrawn from the accounts, and, as such, the Court finds that the Plaintiff has failed to prove by a preponderance of the evidence that the Defendant has failed to explain the loss of the subject assets.

Finally, as to Defendant, Jack Fowler, the Plaintiff alleges that the Defendant should be denied a discharge because of his actions in falsifying a financial statement which was prepared and signed by the Defendant on or about March 12, 1994, in regard to certain discussions the Defendant was having with Banterra Bank about the possibility of obtaining a loan. The evidence indicates that on the financial statement or as it was also referred to a balance sheet which was given to Banterra Bank the Defendant listed a debt to the Plaintiff in the amount of \$2,200 when, in fact, the debt was over ten times that amount. At trial, the Defendant admitted that the financial statement was not correct and that he did, in fact, know that he owed more to the Plaintiff at the time the financial statement was filled out. He also admits that the financial statement was made in this way to make his financial condition appear in better shape than it, in fact, was. However, the testimony and evidence also indicates that the Defendant never obtained any funds from Banterra Bank. The evidence also indicates that the balance sheet or financial

statement of which the Plaintiff complains was never given to the Plaintiff himself in relationship to any transaction. The Plaintiff merely asserts that this false financial statement was an indication that the Defendant was not honest and that, as such, he should be denied a discharge under § 727. In considering this allegation and argument by the Plaintiff, the Court finds that, while the Defendant's conduct as to this financial statement was improper, there is no provision under 11 U.S.C. § 727 that would constitute a ground for denial of the Debtor's discharge based upon the falsities of the financial statement given to Banterra Bank. The only possible area under which this could fit would be 11 U.S.C. § 727(a)(4)(A) in that the Debtor made a false oath or account on the financial statement. However, § 727(a)(4)(A) requires that the false oath or account be made in connection with the bankruptcy case. Since the false oath was made on or about March 12, 1994, some six months before the Debtor filed for relief under Chapter 7, the Court cannot find that the false oath or account was made in connection with the bankruptcy case. As such, the Court must find that the transaction complained of by the Plaintiff between the Defendant and Banterra Bank has no bearing on whether or not the Debtor should receive a discharge in bankruptcy.

In conclusion as to the case against the Defendant, Jack Fowler, the Court finds that the Plaintiff has simply failed to prove fraudulent intent necessary under any of the sections of § 727 upon which the Plaintiff has relied in seeking a denial of the Defendant's discharge. It is clear to the Court that the Plaintiff has put on the best case that he had given the facts that he had to work with. However, the Court finds that the conduct of the Defendant herein has simply not risen to a level which would cause this Court to find that a discharge should be denied pursuant to any provisions of 11 U.S.C. § 727.

The Court now turns to the Complaint of the Plaintiff against Defendant, John Fowler. The Court will not restate the law of the various subsections of 11 U.S.C. § 727 in discussing the Plaintiff's case against Defendant, John Fowler, but will rather concentrate on a discussion of the facts as they apply under the various sections alleged to have been violated by the Defendant.

The Court first notes that the Defendant was a credible witness and the witnesses that were produced on his behalf were also credible. Under § 727(a)(4)(A), the Plaintiff alleges that the Defendant made a false oath on his bankruptcy schedules in failing to list various bank accounts which he owned at the time he filed his petition. This same allegation was made against Defendant, Jack Fowler, and the Court finds that the explanation made by this Defendant concerning his misunderstanding of what was required on the bankruptcy schedules is also credible. The evidence indicates that the accounts held by the Defendant had very little money in them and, as such, there was no real reason for the Defendant to have had any intent to conceal these accounts from his creditors. Here again, as in the case against Jack Fowler, the Court finds that the Plaintiff has failed to meet his burden

of proof to show that the Defendant had a fraudulent intent in omitting the ownership of these various bank accounts on his bankruptcy schedules. Additionally, under § 727(a)(4), the Plaintiff alleges that the Defendant has made a false oath by omitting certain growing crops listed on his bankruptcy schedules. As in the case of Jack Fowler, the Defendant in this case explained that it was the primary responsibility of Jack Fowler to deal with the grain farming operation and that the crops that were growing on the farm at the time of the bankruptcy were listed on the bankruptcy schedules of Jack Fowler rather than being listed on both bankruptcies, making it appear as though there were actually more assets than there were. In looking at the bankruptcy cases filed by the two Debtors/Defendants, the Court finds that, taking those cases as a whole, the information concerning the growing crops was included. From this, the Court must find that there was no fraudulent intent on the part of the Defendant that can be adduced from the evidence before the Court. Finally, under § 727(a)(4), the Plaintiff alleges that the Defendant was guilty of making a false oath in his failure to disclose that he had an interest in a partnership or a joint venture. Here again as in the case with Jack Fowler, the Court finds that the operation between this father and son could be at best called a loose joint venture, and there is no evidence to indicate that the Defendant herein had any knowledge of what a joint venture or a partnership actually was as is typical in father and son farming operations. No particular form of business was used or even considered. As such, the Court again must find that the Plaintiff has failed to prove any fraudulent intent on the part of the Defendant for his failure to schedule an interest in a partnership or a joint venture.

Pursuant to 11 U.S.C. § 727(a)(2)(A), the Plaintiff alleges that the Defendant, with an intent to hinder, delay, or defraud a creditor, transferred certain property of the bankruptcy estate in that, on or about September 13, 1994, the Defendant sold 22 hogs which belonged to the Defendant in the name of his then girlfriend, Susan Hoover.¹ The Court has carefully examined the evidence presented on this issue and finds that there is absolutely no evidence upon which the Court can find that there was any fraudulent intent or even that the hogs in question were actually property of the Defendants. The Plaintiff seeks for the Court to draw an inference that the hogs sold in question belonged to the Defendant; however, based upon the testimony and the other evidence submitted, the Court finds that it is unable to draw this inference given the plausible nature of the explanation of the September 13, 1994, hog sale offered by the Defendant and Susan Hoover Fowler. As in the Complaint against Jack Fowler, the Plaintiff alleges that the Defendant, John Fowler, has violated § 727(a)(2)(A) as a result of the August 1994 livestock sale in which proceeds were paid over to Peoples National Bank rather than to the Plaintiff. In the interest of brevity, the Court will not restate

¹ The Defendant and Susan Hoover have since married and Susan Hoover is now known as Susan Hoover Fowler.

its findings and conclusions of law as to this issue, but will rather state that those findings and conclusions equally pertain to the allegation against John Robert Fowler as they do for the allegation against Jack Eugene Fowler. The Court finds that there has been no showing of fraudulent intent on the part of Defendant, John Fowler, and, as such, the Plaintiff's Complaint must fail on this issue.

As in the case against Defendant, Jack Fowler, the Plaintiff has alleged that Defendant, John Fowler, is also undeserving of a discharge for his part in preparing the March 12, 1994, balance sheet or financial statement that was given to Banterra Bank. John Fowler has admitted his part in preparing this financial statement and also his knowledge that the financial statement was in error. However, as the Court found in its discussion of this issue concerning Defendant, Jack Fowler, there is no provision under § 727 that would apply to this factual situation so as to deny the Defendant discharge.

In conclusion, the Court finds that the Plaintiff has failed to meet its burden of proof in proving the various sections of 11 U.S.C. § 727 plead as a basis for denying the Defendants discharges herein. While the Court agrees with the Plaintiff's assertion that a discharge in

bankruptcy is only for the honest debtor, the Court disagrees that the Debtors herein have engaged in a pattern of dishonesty that would rise to the level requiring a denial of discharge.

ENTERED: AUGUST 21, 1995

/s/ GERALD D. FINES
United States Bankruptcy Judge