UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS

In Re	)	In Bankruptcy No. 95-50177
MICHAEL PATRICK MURPHY	)	
Debtor.	)	
STEVEN N. MOTTAZ,	)	
Plaintiff,	)	
v.	)	Adversary No. 95-5110
MICHAEL PATRICK MURPHY,	)	
Defendant.	)	

OPINION

This matter is before the Court on an objection to discharge filed by the Trustee pursuant to 11 U.S.C. § 727(a)(2).

The material facts of this case are not in dispute. On August 31, 1990, the Debtor entered into a delivery service agreement with the St. Louis Post-Dispatch. Under the terms of the parties' contract, the Debtor agreed to deliver the Post-Dispatch to home delivery customers within a specified area in exchange for a fee. The agreement also required the Debtor to remit a portion of the subscription fees that he collected to the Post-Dispatch-in a timely manner.

Customarily, home delivery routes such as the Debtor's are purchased and sold by the individual carriers. In order to purchase his route, the Debtor obtained two loans from the St. Louis Newspaper Carrier's Credit Union totaling $26,000. He also borrowed approximately $43,418.49 from his parents, Thomas and Mary Ann Murphy, and $3,000 from his brother, Thomas Murphy, Jr.

Unfortunately for the Debtor, this venture was unsuccessful. When the Debtor failed to satisfy his financial obligations to the Post-Dispatch, the paper terminated the service contract and offered to repurchase the route for $75,000, less any amounts owed to the Post-Dispatch. The Debtor accepted this offer by a letter dated December 7, 1994. That letter, confirming his agreement with the paper, included the following passage:

> I fully understand that the monies that I now owe the St. Louis Post-Dispatch will be deducted from the Seventy-Five ($75,000) Thousand Dollars. Per your conversation with my father today, we will be notified... [of] the full amount of my indebtedness with the St. Louis Post-Dispatch, and accordingly what my Net Receipt will be.
>
> It is also understood that the check will be made payable to Michael P. Murphy and Thomas P. Murphy and to no one else.

Plaintiff's Exhibit F. These terms were memorialized in a document dated December 7, 1994, which was signed by the Debtor and a representative of the Post-Dispatch.

On December 19, 1994, the Post-Dispatch issued a check payable to Michael P. Murphy, Thomas P. Murphy, and Mary Ann Murphy in the amount of $40,731.18.[1] Thomas and Mary Ann deposited $37,231.18 of the sale proceeds into a newly opened checking account. The remaining funds were retained by the Debtor. After making the initial deposit, Thomas issued four checks to the Debtor or on his behalf totaling $10,500.[2] However, despite these withdrawals, the account was actually controlled by Thomas and Mary Ann Murphy. Because the Debtor was unemployed, his parents would periodically give

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[1]'Although the actual purchase price was $75,000, the Post-Dispatch deducted $34,268.82 from the sales proceeds for amounts due it from the Debtor.

[2]The following withdrawals were made on behalf of the Debtor from this account:

> Check No. 101 was written payable to "Cash" in the amount of $2,500. It was used to purchase a cashier's check in the amount of $1,800. The balance was given to the Debtor in cash.
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> Check No. 102 was issued to Campbell and Coyne, attorneys for Michael Murphy, in the amount of $6,250.
>
> Check No. 103 was issued to Campbell and Coyne in the amount of $1,500 to represent the Debtor in a criminal matter in the state circuit court.
>
> Check No. 104 was written payable to "Cash" in the amount of $300. These funds were given to the Debtor by his parents.

him money for living expenses and legal fees. However, the Debtor did not have direct access to the account.

On March 6, 1995, the Debtor filed for protection under Chapter 7 of the Bankruptcy Code. He disclosed the transfer to his parents both in his Statement of Affairs and at his § 341 meeting of creditors. It is undisputed that the Debtor made no attempt to conceal the transfer. Further it is also undisputed that the Trustee knew of the transfer of funds to the Debtor's parents from the inception of the bankruptcy.[3]

On August 3, 1995, the Trustee filed the instant adversary complaint, seeking to deny the Debtor a discharge pursuant to 11 U.S.C. § 727(a)(2) .

Section 727(a)(2)(A) denies a debtor from receiving a discharge if, within one year of filing his bankruptcy petition, the debtor transfers or conceals property with the intent to hinder, delay or defraud a creditor.[4] The objecting party has the burden of proving each of these elements by a preponderance of the evidence. In re Bailey, 145 B.R. 919, 925 (Bankr. N.D. Ill. 1992). In the instant case, the parties agree that a transfer of property was made to Thomas and Mary Ann Murphy within one year of the filing of the Debtor's bankruptcy petition. The issue that the Court must determine is whether the transfer was made with the intent to hinder delay, or defraud the Debtor's creditors.

In order to prevail in a § 727(a)(2)(A) action, the party seeking denial of the discharge must prove that the debtor acted with the actual intent to harm his creditors. In re Krehl, 86 F.3d 737, 743 (7th Cir.

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[3]Michael A. Campbell, Debtor's attorney, testified that he spoke with the Trustee on March 10, 1995, and advised him of numerous details of this case, including the transfer of funds to Thomas and Mary Ann Murphy. In addition, the Defendant submitted into evidence a letter written to the Trustee by John McNearney, counsel for Thomas and Mary Ann Murphy, which indicates that he informed Mr. Mottaz of the transfer and of the circumstances surrounding it as well. (Defendant's Exhibit 4 Letter of John P. McNearney dated May 2, 1995).

[4]Section 727(a)(2)(A) provides as follows:

> The court shall grant the debtor a discharge, unless--
>
> (2) 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.

11 U.S.C. § 727(a)(2)(A).

1996); In re Smiley, 864 F.2d 562, 566 (7th Cir. 1989). Constructive intent is insufficient. In re Chastant, 873 F.2d 89, 91 (5th Cir. 1989); Tastee Donuts, Inc. v. Bruno, 169 B.R. 588 (E.D. La. 1994). However, because direct evidence of actual intent is often unavailable (presumably because a debtor is unlikely to admit that he intended to defraud his creditors), the plaintiff may rely on circumstantial evidence or on inferences drawn from the debtor's course of conduct in order to prove the requisite intent Matter of Agnew, 818 F.2d 1284 (7th Cir. 1987); First National Bank of Belleville v. Smiley (In re Smiley), Ch. 7 Case No. 84-30747, Adv. No. 85-0064, slip op. at 10 (Bankr. S.D. Ill. March 17, 1987), affld Case No. 87-5172 (S.D. Ill. Dec. 14, 1987), aff'd 864 F.2d 562 (7th Cir. 1989).

In order to determine whether a debtor transferred property with an improper intent pursuant to § 727(a)(2)(A), courts look for several factors which tend to indicate "actual fraud" under § 727(a)(2)(A). These factors, known as "badges of fraud" include:

(1) the lack of inadequacy of consideration received for the transfer;

(2) the familiar, friendship or close association between the parties;

(3) the retention of possession, benefit, or use of the property in question;

(4) the financial condition of the party sought to be charged both before and after the transaction in question;

(5) the existence or cumulative effect of the pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suit by creditors; and

(6) the general chronology of the events and the transactions under inquiry.

Chastant, 873 F.2d at 91; In re Kablaoui, 196 B.R. 705, 709-710 (Bankr. S.D.N.Y. 1996). See also In re Gipe, 157 B.R. 171 (Bankr. M.D. Fla. 1993); In re Schroff, 156 B.R. 250 (Bankr. W.D. Mo. 1993). Any one of these factors alone is sufficient to create a presumption that the debtor acted with the requisite intent to deny a discharge pursuant to § 727(a)(2)(A), particularly where property is transferred gratuitously or to relatives. Chastant, 873 F.2d at 91; Kablaoui, 196 B.R. at 710 (Bankr. S.D.N.Y. 1996); In re Volpert, 175 B.R. 247, 2264 (Bankr. N.D. Ill. 1994); Schroff at 254. Once such a transaction has been shown by the plaintiff, the burden shifts to the debtor to show that his intent was not to hinder, delay, or de fraud. Schroff at 254.

Certainly, many indicia of "actual fraud" are present in this case. The sale proceeds were transferred to members of the Debtor's family and, although the Debtor did not retain possession of these sale proceeds, he did continue to use the funds for his benefit. These actions, considered with the fact that the Debtor was experiencing financial difficulties at the time of the transfer, are sufficient to establish at least a presumption that the Debtor transferred the sale proceeds to his parents with the intent to defraud his creditors in violation of § 727(a)(2)(A).

However, after hearing the testimony of the Debtor and of Thomas Murphy, Sr., the Court finds that explanations offered for the transfer seem credible under the circumstances, and, are sufficient to rebut any presumption of fraud in this case. First, the transfer in this case was not purely gratuitous. The proof of claim filed by the Debtor's parents indicates that the Debtor owed them at least $115,705.37 at the time that the bankruptcy was filed. Although the Debtor's Statement of Financial Affairs states that his parents were "paid" $37,731.18 from the sale of the Post-Dispatch route toward satisfaction of this debt, the testimony of both the Debtor and of his father indicates that neither of them actually believed that Mr. and Mrs. Murphy would be allowed to retain all of the sales proceeds.[5]

Second, at the time of the events in question, the Debtor was experiencing severe personal problems. In addition to his financial difficulties, the Debtor was in the process of a divorce and had, in fact, even attempted suicide. Although it is undisputed that the Debtor prepared and signed the acceptance letter to the Post-Dispatch, the actual sale negotiations were conducted by Thomas Murphy. Mr. Murphy testified that he was the one who had directed the Post-Dispatch to include him as a payee on the check for the sale of the route, not the Debtor. The reason for this was not to defraud the Debtor's creditors. Rather, it was Thomas Murphy's unrefuted testimony that he intended to hold the sale proceeds for the benefit of the creditors until his son was capable of managing the money himself.

[5]When asked about repayment of the debt to his parents, the Debtor testified that he "hoped" that at least a portion of the sale proceeds would be available to satisfy the obligation to his parents. Further, Thomas Murphy testified that he did not believe that he and his wife would receive payment from these funds. Rather, he thought that the money would be used to satisfy the Debtor's obligations to his other creditors, particularly the Internal Revenue Service. There was no evidence presented that the Debtor had transferred the money to his parents merely to avoid paying his creditors.

Finally, it is undisputed that the Debtor disclosed this transfer was listed in the Debtor's schedules and investigated at the § 341 meeting of creditors. Although subsequent disclosure of a transfer is not necessarily sufficient to overcome a presumption of "actual fraud" for purposes of § 727(a), In re Adeeb, 787 F.2d 1339 (9th Cir. 1986), it has been held that a debtor's disclosure of an allegedly fraudulent transaction at the first meeting of creditors is a factor that the court may consider in determining whether the debtor acted with the requisite intent. See In re Barney, 86 B.R. 105, 110 (Bankr. N.D. Ohio 1987); In re Wolmer, 57 B.R. 128 (Bankr. N.D. Ill. 1986); In re Waddle, 29 B.R. 100 (Bankr. W.D. Ky. 1983). In the instant case, the disclosure of the transaction by both the Debtor and his parents, coupled with the other evidence, leads this Court to conclude that the Debtor did not transfer the proceeds of the sale of the Post-Dispatch route to his parents with the intent to hinder, delay or defraud a creditor in violation of § 727(a)(2)(A). In fact, it appears to the Court that the transfer of funds to the Debtor's parents was actually to protect the Debtor's creditors because the Debtor had shown himself to be financial irresponsible.

Accordingly, the Trustee's Complaint Objecting to Discharge is denied.

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

ENTERED: March 3, 1997

/s/ LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE