

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

JOHN J. HORMOVITIS,

Debtor.

Case No. 07-12276

Chapter 7

PAUL A. LEVINE, Chapter 7 Trustee,

Plaintiff,

-against-

Adversary No. 07-90212

JOHN J. HORMOVITIS,

Defendant.

APPEARANCES:

PAUL A. LEVINE, ESQ.

Chapter 7 Trustee

Lemery Greisler, LLC

50 Beaver Street

Albany, New York 122207

RICHARD CROAK, ESQ.

Attorney for Defendant/Debtor

314 Great Oaks Blvd.

Albany, New York 12203

Hon. Robert E. Littlefield, Jr., Chief United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Currently before the court is an adversary proceeding commenced by the Chapter 7 Trustee, Paul A. Levine, Esq. (“Trustee”), seeking a denial of the discharge of John J. Hormovitis (“Debtor”) pursuant to 11 U.S.C. §§ 727(a)(4)(A)¹ based upon a false oath.

¹All statutory references herein are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, unless otherwise indicated.

JURISDICTION

The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(J), and 1334(b).

FACTS

The relevant facts are as follows. The Debtor, represented by counsel, filed a voluntary petition under Chapter 7 of the Bankruptcy Code, along with related schedules, on August 28, 2007. (Pl.'s Ex. 1.) On schedule B (Personal Property), the Debtor listed personal property totaling \$25,535.00. (*Id.*) In response to item 25 on schedule B, "Automobiles, trucks, trailers, and other vehicles and accessories," the Debtor scheduled a 2005 Chevy Silverado 1500 worth \$20,435. (*Id.*) Pursuant to schedule F, the Debtor has \$61,884.00 in unsecured debts. (*Id.*)

The Debtor resides at 1 Sussex Road, East Greenbush, New York with his significant other, Geraldine Knapp, a police officer. (Trial Tr. 24, 52, June 9, 2008.) The residence is owned by Ms. Knapp. (*Id.*) The Debtor and Ms. Knapp have lived together for approximately six and a half years. (Tr. 48.)

On October 2, 2007, the Trustee conducted a meeting of creditors pursuant to § 341 (the "Meeting of Creditors"). The Debtor and his attorney appeared at the Meeting of Creditors, and the Trustee examined the Debtor under oath.

The Trustee filed a timely adversary complaint on November 9, 2007, seeking an order denying the Debtor his discharge pursuant to § 727(a)(4). The Trustee alleged in the Complaint, *inter alia*, that the Debtor failed to disclose the existence of his 1984 Harley Davidson motorcycle anywhere in his schedules and/or statements filed with his bankruptcy petition and, in signing and filing his bankruptcy schedules without disclosing this substantial asset, the Debtor

knowingly and fraudulently made a false oath or account. (Complaint (Doc. No. 1) ¶¶ 5, 6, 14.)

The Debtor filed an Answer with two affirmative defenses on December 4, 2007, admitting the factual allegations set forth in the Complaint, but denying the conclusions reached by the Trustee. (Answer (Doc. No. 5).)

Subsequent to the Meeting of Creditors, the Debtor turned the motorcycle over to the Trustee. The court granted the Trustee's application to conduct an auction sale of the motorcycle and to retain Collar City Auctions and Realty, Inc. to conduct the sale. (Case No. 07-12276, Doc. No. 14.) The Trustee attended the auction. (Tr. 67.) The high bid for the motorcycle was \$4,500. (*Id.*) The proceeds were turned over to the Trustee. (*Id.*) The Trustee filed a Notice of Asset Case on January 30, 2008. (Case No. 07-12276, Doc. No. 17.)

A trial in this proceeding was held on June 9, 2008. The Debtor and Geraldine Knapp testified at the trial. Admitted into evidence at the trial was an audiotape of the Meeting of Creditors. (Tr. 35-40.) The audiotape confirmed that the Debtor testified at the Meeting of Creditors that he (1) signed the petition, (2) reviewed it to make sure that it was truthful and accurate, and (3) listed all of his assets. (Tr. 35-36.) The audiotape also substantiated that the Debtor initially responded "no" to the Trustee's inquiry of whether he had a motorcycle and only changed his answer when the Trustee asked him specifically if he had a Harley Davidson. (Tr. 36-37.) Pictures of the motorcycle were also introduced at trial. (Pl.'s Exs. G1, H.)

The Debtor testified at the trial that the motorcycle did not appear on the Department of Motor Vehicles search his attorney obtained. (Tr. Tr. 45.) The Debtor also testified, however, that at the time of the Meeting of Creditors he believed he was the owner of the Harley Davidson motorcycle. (Tr. 28.) While the Debtor indicated at trial that he could no longer swear he was

the titled owner of the motorcycle, in response to the Trustee's question who else could own it, he responded that he did not know. (Tr. 28, 45.) The Debtor's motorcycle was stored in his garage, which is located below grade of the ranch-style home where he and Ms. Knapp reside. (Tr. 29-30.) Ms. Knapp also keeps her Honda motorcycle in the garage. (Tr. 49.) The garage is accessible through either an overhead door or the house. (Tr. 30.) The Debtor and Ms. Knapp do not keep their automobiles in the garage but use it as a basement for storage. (Tr. 31.) Their washer and dryer are also located there. (*Id.*)

The Debtor and Ms. Knapp store their lawn mower and snow blower in the garage near the motorcycle. (Tr. 31-32, 50-51.) The Debtor is generally responsible for mowing the grass and removing the snow from the driveway. (*Id.*) The Debtor can see the motorcycle each time he takes out and puts away the lawn mower and snow blower. (*Id.*) The washer and dryer are also in the general vicinity of the motorcycle in the garage, and the Debtor can see the motorcycle when he helps with the laundry. (Tr. 32-33, 51-52.)

Although the Debtor testified he had not ridden the motorcycle in two and a half or three years, he also indicated that he has a valid motorcycle license and kept the motorcycle insured, as every year he intended to ride it. (Tr. 23-24, 40, 41, and 44.) According to the Debtor, he believes the motorcycle was registered at the time of the Meeting of Creditors. (Tr. 25-26; Pl.'s Ex. A.) Ms. Knapp testified that the Debtor loved the motorcycle. (Tr. 52.)

While the Debtor testified at the Meeting of Creditors that he had reviewed his petition prior to signing it (Tr. 36), at trial he indicated he did not read the papers before he signed them (Tr. 34-35). When this discrepancy was pointed out by the Trustee, the Debtor seemed to suggest that he equated reviewing his petition with giving his attorney information to input into

the computer. (Tr. 41-42.)

At the conclusion of trial, the parties were afforded the opportunity to file post-trial memoranda of law. The final submission was filed on September 25, 2008, at which time this matter was taken under advisement.

ARGUMENT

In his post-trial submissions, the Trustee argues that the Debtor made at least three false oaths with regard to his concealment of ownership of the 1984 Harley Davidson motorcycle. First, the Debtor lied when he signed his petition and schedules without disclosing the motorcycle. Then, the Debtor testified at the Meeting of Creditors that he listed all of his assets in his petition. Finally, the Debtor lied when he answered “no” to the Trustee’s question at the Meeting of Creditors as to whether he had a motorcycle. The Trustee asserts further that (1) the Debtor knew the statements were false, (2) they were made with fraudulent intent, and (3) they were material.

The Debtor responds that the Trustee has failed to establish that he owned the 1984 Harley Davidson Motorcycle. The Debtor asserts that if he did not own the motorcycle, there was no duty to disclose it. Alternatively, the Debtor indicates that he did not knowingly give false testimony, rather, due to nerves, stress, and confusion, he forgot about the motorcycle. Furthermore, if the Debtor intended to deceive the Trustee, he would have continued to deny the existence of the motorcycle, rather than disclose its existence at the Meeting of Creditors. Lastly, the Debtor argues that even if the court finds a false statement, it was not material as the Debtor cooperated fully in turning the motorcycle over to the Trustee, and the Trustee ultimately recovered \$4,500. The Debtor surmises that if the motorcycle had been listed in his petition, he

probably would have made an offer to purchase the Trustee's interest in an amount less than its full value, resulting in a smaller recovery for the unsecured creditors.

DISCUSSION

Section 727(a)(4) provides for the denial of discharge if “the debtor knowingly and fraudulently, in or in connection with the case — (A) made a false oath or account.” 11 U.S.C. § 727(a)(4)(A) (2008). A denial of discharge pursuant to § 727 is a severe sanction and must be construed strictly in favor of the debtor. *Pergament v. Smorto (In re Smorto)*, No. 07-CV-2727, 2008 WL 699502, at *4 (E.D.N.Y. Mar. 12, 2008) (citing *State Bank of India v. Chalasani (In re Chalasani)*, 92 F.3d 1300, 1310 (2d Cir. 1996)). A discharge under § 727, however, is a privilege, not a right, and may only be granted to the honest debtor. *Dubrowsky v. Perlbinde (In re Dubrowsky)*, 244 B.R. 560, 572 (E.D.N.Y. 2000) (citation omitted).

A creditor objecting to discharge pursuant to § 727(a)(4) bears the burden of proving, by a preponderance of the evidence, the following five factors: (1) the debtor made a statement under oath, (2) such statement was false, (3) the debtor knew the statement was false, (4) the statement was made with fraudulent intent, and (5) the statement related materially to the bankruptcy case. *Levine v. Raymonda (In re Raymonda)*, No. 99-13523, Adv. Pro. No. 99-91199, slip op. at 5 (Bankr. N.D.N.Y. Feb. 9, 2001) (citations omitted). Once the moving party meets its initial burden to produce evidence of a false statement, the burden of production shifts to the debtor to produce a “credible explanation.” *In re Adler*, 395 B.R. 827, 841 (E.D.N.Y. 2008) (citation omitted). “If a debtor fails to provide such evidence or a credible explanation for his failure to do so, a court may infer fraudulent intent.” *In re Murray*, 249 B.R. 223, 228 (E.D.N.Y. 2000) (quoting *In re Gollomp*, 198 B.R. 433, 437 (S.D.N.Y. 1996)). It is up to the

Court to determine whether or not it finds a debtor's assertion to be credible. *See Steibel v. Bressler (In re Bressler)*, 387 B.R. 446, 460-61 (Bankr. S.D.N.Y. 2008) (“[A] determination concerning fraudulent intent depends largely upon an assessment of the credibility and demeanor of the debtor”) (quoting *Williamson v. Fireman's Fund Ins. Co.*, 828 F.2d 249, 252 (4th Cir. 1987)).

It is undisputed that the Harley Davidson was not listed on the Debtor's petition and schedules. The “petition and annexed schedules constitute statements under oath for purposes of § 727(a)(4)(A).” *See In re Bressler*, 387 B.R. at 460 (quoting *Nof v. Gannon (In re Gannon)*, 173 B.R. 313, 320 (Bankr. S.D.N.Y. 1994)). As such, the first element of § 727(a)(4)(A) is satisfied; there were statements made under oath.

Debtor argues the Trustee failed to establish he owned the Harley Davidson and, thus, he could not have made a false statement regarding its ownership. The Debtor notes that the Trustee did not produce the certificate of title for the motorcycle. He also asserts that the search obtained from the Department of Motor Vehicles did not reference a Harley Davidson being owned by him. The Debtor's arguments are not convincing. First, the Department of Motor Vehicles search referenced is not part of the record. Most of what was presented in support of this position was Debtor's hearsay statements and counsel's argument. Even if the court were to give credence to the Department of Motor Vehicles search, it is unpersuasive when weighed against the uncontroverted evidence that clearly establishes the Debtor purchased the Harley Davidson in 1992, he put the motorcycle in Ms. Knapp's basement, he had possession of the motorcycle until he surrendered it to the Trustee, and he obtained and paid for the insurance and registration for the motorcycle each year. Until the Debtor turned the motorcycle over to the Trustee, he

exercised complete dominion and control over it. There is nothing in the record to substantiate that anyone but the Debtor owned the motorcycle. Thus, the second element of § 727(a)(4)(A)—the statements were false—is also satisfied.

The Debtor’s own testimony at the Meeting of Creditors confirms that he knew his prior statements, namely his petition and schedules, were false. A debtor cannot shield himself from an accusation of fraud by not reviewing his petition and schedules prior to filing them. A debtor has a duty to carefully review the information contained in his petition, schedules, and statements and insure that they are accurate and complete. *See In re Zimmerman*, 320 B.R. 800, 806 (Bankr. M.D. Pa. 2005). As a result of this duty, the court finds the Debtor is deemed to have known the statements were false; thus, the third element of § 727(a)(4)(A) is also satisfied.

The issues remaining are whether Debtor’s failure to schedule his Harley Davidson was done with the intent to deceive, and whether it related materially to his case. With regard to the fourth element, “[f]raudulent intent must be shown by actual, not constructive fraud. The party objecting to the discharge must show that the information was omitted for the specific purpose of perpetrating a fraud and not simply because the debtor was careless or failed to fully understand his attorney’s instructions” *In re Dumbrowsky*, 244 B.R. at 571-72 (citations omitted). A court may find intent to deceive in a “reckless disregard of both the serious nature of the information sought and the necessary attention to detail and accuracy in answering,” but not in mere ignorance or carelessness. *Sanderson v. Ptasinski (In re Ptasinski)*, 290 B.R. 16, 22 (Bankr. W.D.N.Y. 2003) (citing *Diorio v. Kreisler-Borg Constr. Co.*, 407 F.2d 1330 (2d Cir. 1969); *see In re Brundege*, 359 B.R. 22, 30 (Bankr. N.D.N.Y. 2007).

According to the Trustee, the Debtor’s false statements were made with fraudulent intent.

The justification offered by the Debtor for not disclosing his Harley Davidson motorcycle in his petition and schedules was that he forgot about it. Given the particular facts of this case, the court is unable to accept the Debtor's explanation. The Debtor's testimony with respect to the unsecured asset is simply not credible. The pictures introduced at trial show an assembled, shiny red Harley Davidson decorated with an American flag. The motorcycle appears to be well taken care of. Ms. Knapp, whom the court found believable, testified that the Debtor loved his motorcycle. The Debtor acknowledged that he kept the bike insured and renewed his motorcycle license each year because each year was going to be the year he got it back on the road. The motorcycle was in plain view each time the Debtor did laundry or took out the lawn mower or snow blower. Based upon the record, it is inconceivable to the court that the Debtor forgot he had a Harley Davidson motorcycle, and the court cannot attribute the Debtor's failure to list his Harley Davidson to inadvertence or oversight.

Additionally, the court is troubled by the cavalier attitude displayed by the Debtor with respect to reviewing his petition and schedules and the accuracy of the same. In his post-trial submissions, Debtor's counsel attempts to argue the Debtor's confusion was a result of stress and nerves, however, this excuse was not developed at trial. Thus, at the very least, the court finds the Debtor has shown a reckless disregard for both the serious nature of the information being sought and the necessary attention to detail and accuracy required in completing his petition and schedules. Therefore, the court concludes the Trustee has proven by a preponderance of the evidence that the Debtor's false statement contained in his petition and schedules was made with fraudulent intent.

The remaining question is whether the false statement is material. The Debtor contends

that because there was no prejudice to the estate, the alleged misstatement is not material. To prevail under § 727(a)(4)(A), the objecting creditor must establish that the false statement was made with respect to a material matter, “that is one bearing a relationship to the debtor’s business transactions or estate or which would lead to the discovery of assets, business dealings or existence or disposition of property.” *In re Murray*, 249 B.R. at 228 (citations omitted). Contrary to the Debtor’s assertion, “materiality does not require a showing that the creditors were prejudiced by the false statement.” *Id.* at 229 (quoting *In re Robinson*, 506 F.2d 1184, 1188 (2d Cir. 1974)). Clearly, the fifth and final element of § 727(a)(4)(A) is met as the false oath related to the discovery of an asset.

When a debtor files for bankruptcy protection, he or she has an affirmative duty to file accurate schedules and amended schedules. Successful administration of a bankruptcy case depends on a debtor's full disclosure. *In re Shah*, 388 B.R. 23, 37 (Bankr. E.D.N.Y. 2008) (citing *In re Dubrowsky*, 244 B.R. at 572). The purpose of § 727(a)(4)(A) is to insure that adequate information is available to those interested in the administration of the bankruptcy estate at the outset of the proceeding, so that decisions can be made based on fact rather than fiction. *Id.*

The alternative would be chaos; trustees would have to approach each debtor and assume the worst, i.e. that the debtors have provided faulty or incomplete information. Debtors must never lose sight of the fact that, ordinarily, they come into this court voluntarily and request relief, ultimately leading to discharge. The price for that discharge is timely, accurate and complete disclosure of all the information required by the Code.

In re Raymonda, No. 99-13523, Adv. No.99-91199, slip op. at 10.

CONCLUSION

For the reasons set forth herein, the Trustee's objection to the Debtor's discharge is sustained, and the Debtor's discharge is denied under § 727(a)(4)(A).

It is so ORDERED

Dated: April 27, 2009
Albany, New York

/s/ Robert E. Littlefield, Jr
Hon. Robert E. Littlefield, Jr.
Chief U.S. Bankruptcy Judge