

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

TONI F. NATALIE

Debtor.

Case No. 99-16195

Chapter 7

KEITH RANIERE

Plaintiff

vs.

Adv. Proc. No. 01-90027

TONI F. NATALIE

Defendant.

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

Memorandum-Decision & Order

The matter before the court is the objection to discharge filed by Creditor Keith Raniere (“Plaintiff”). The court has jurisdiction over this core proceeding pursuant to 28 U.S.C.

§§ 157(a), 157(b)(1), 157(b)(2)(J) and 1334(b).

Facts

Based on the documents filed in the Debtor's case and the testimony and exhibits admitted at trial, the court finds the following:

The Debtor filed a Chapter 7 petition on October 27, 1999. National Health Outlet A Place of Creations, Inc. ("NHO"), a corporation owned by the Debtor, also filed a Chapter 7 petition on that date. Gregory Harris, Esq. was appointed the trustee in each bankruptcy case.

On her Schedule F (Creditors Holding Unsecured Nonpriority Claims), the Debtor states that she owes the Plaintiff \$2,000 for "1996-99 property claims." Her Schedule F lists a claim for Albany Restaurant in the amount of \$46,800.09; it also states the debt was for "1999 Guarantor purchases" and that a codebtor exists. The codebtor listed on the Debtor's Schedule H (Codebtors) for the Albany Restaurant debt is NHO. NHO's Schedule H lists the Debtor as a codebtor on the Albany Restaurant debt. Neither the Debtor nor NHO lists Albany Restaurant on its Schedule G (Executory Contracts and Unexpired Leases).

Both the Debtor's and NHO's Schedules F also state which unsecured nonpriority claims are subject to setoff; they are remarkably similar. The Debtor's Schedule F lists the claims of 10 Lake Corporation, Advanta Leasing Services, American Express Centurion Bank, Fleet Leasing Corp. (Sanwa), GE Capital, GE Capital Colonial Pacific Corp., PC Information Leasing Corp. and Southeastern Leasing & Equipment Corporation. NHO's Schedule F¹ lists Copelco Capital, Inc., GE Capital, GE Capital Colonial Pacific Corp., IFC Information Leasing Corp. and Preferred Capital

¹NHO's Schedule F is missing page 1.

Corporations as creditors having claims subject to setoff.

In response to Schedule B's (Personal Property) question 5, the question which asks what books, pictures, art objects, etc. a debtor owns, the Debtor checked the box labeled "NONE." On the amended Schedule B she filed on April 21, 2000, however, she states she owns "Paintings, Prints, Posters" worth \$1,100. She later testified at one of her depositions that the \$1,100 value included her son's painting and posters and prints and that the frames were worth more than the actual graphics themselves.

During her depositions, Michael Rudin, Esq., the Debtor's former bankruptcy attorney,² often commented about her Schedule B amendment, particularly her belief that the artist presented the portrait to her son as a gift. (*See* Ex. 5 pp. 66-67.) However, at trial the Debtor denied that she had previously testified the painting belonged to her son. (Tr. 90.) In an affidavit the Debtor signed on January 28, 2000 and later filed with the court, the Debtor stated, "All the artwork I had consisted of art worth no more than Five Hundred and 00/100 Dollars (\$500.00), all of which were sold in 1998 to pay my medical expenses." Whenever asked under oath if she ever had an appraisal of the artwork done, she answered she had not.

On her Schedule B, the Debtor also listed an ownership interest in Blue Crystal LLC and Hi-Step Enterprises, Inc. During her depositions, she testified she was at least a part owner of both entities and both operated pizzerias.

Both the Debtor and NHO had a section 341 meeting of creditors scheduled for December 13,

²Christian H. Dribusch, Esq., was substituted as attorney for the Debtor in this adversary proceeding on June 12, 2001.

1999. The Debtor attended the meeting as an individual in her own case and in her capacity as a corporate officer of NHO in the corporation's case.³ Several individuals attended the meetings, including the Trustee and her former counsel. An attorney for one of the creditors asked the Debtor a series of questions regarding transfers "in the last six years." (Ex. 28 pp. 14-15.)⁴ During that line of questioning, Rudin interrupted the creditor's attorney and asked him questions like "of what value?" and "without value or for value?"

When the Trustee conducted his due diligence, including reviewing tax returns and corresponding with or otherwise interviewing third parties, he used documentation the Debtor produced. He ultimately filed a no distribution report in each case and NHO's case was closed. Later, the Trustee reopened that case to provide the Debtor's business associate, Nancy Saltzman ("Saltzman"), with an opportunity to purchase the Debtor's interest in five or six of the business entities she disclosed in her schedules. Saltzman never made an offer so the Trustee closed the corporation's case again.

The Debtor attended high school until the ninth grade. Prior to her business and personal involvement with the Plaintiff, the Debtor sold fruit baskets out of her home. The Plaintiff and an associate of his named Karen Unterreiner helped the Debtor form numerous business entities. He prepared many of the documents submitted to third parties by the Debtor; he also assisted in acquiring equipment.

³At trial, the court received the transcript of the 341 meeting into evidence for impeachment purposes only. (Tr. 99.)

⁴The court admitted Exhibit 28 for impeachment purposes only. (Tr. 99.)

In March or April 1999, the Debtor and Plaintiff's personal relationship ended. Thereafter, he began harassing her and otherwise disrupting her business to the point where she hired Rudin. At trial, the Plaintiff did not controvert the Debtor's testimony that his influence over her caused her to surrender her adopted son to her ex-husband.

Approximately one month prior to filing for bankruptcy protection, the Debtor closed NHO and secured the equipment in the building it leased from the landlord. When the Debtor visited the site more than a year later, she noticed much of the equipment NHO had leased remained there and was being used by the current tenant. She neither took the equipment nor sold any of it. NHO has disclosed in its Statement of Financial Affairs, however, that certain small restaurant equipment was sold to Zylos, Inc. and the proceeds were used to pay sales taxes. An employee of ILC, an equipment lessor, corroborated the Debtor's testimony that the landlord was in possession of the equipment post petition. (Tr. p. 42.) An employee of Quiktrak, a company that does onsite inspection and inventory verification, testified that he personally saw up to 75% of the equipment the equipment lessors were looking for on the premises. (Tr. p. 59.) Salzman filed a section 523 adversary proceeding⁵ against the Debtor and requested certain documentation from her and NHO. No one has challenged the Debtor's testimony that she provided approximately 33 banker boxes of records. The boxes contained personal checks, business checks, bank statements, credit card statements, tax returns, corporate books, Quickbook reports and lease agreements. The Debtor was unable to provide the

⁵Ms. Salzman was represented by the law firm of Whiteman, Osterman & Hanna. An attorney from that firm, Mr. Leslie Apple, "assisted" the Plaintiff's attorney in this adversary proceeding. (Tr. 4.)

computer records she kept for the various corporations she owned due to a computer virus. None of the documents she provided to Salzman have been returned.

On September 15, 1999, Hi-Step Enterprises, Inc., a non-debtor corporation the Debtor owns, sold certain assets, including the name “Mr. Shoes Pizza,” to Zylos, Inc., an entity operated by the Debtor’s mother, Joan Schneier. The Debtor’s brother ran Hi-Step’s day to day operations. The proceeds were allegedly used to pay Hi-Step’s tax obligations although no one offered any other evidence supporting or challenging that. The Debtor, in a January 28, 2000 affidavit, swore, “Hi Step never owned the name Mr. Shoes Pizza.” (Ex. 7 ¶ 12e.)

According to Schneier’s testimony and a promissory note dated June 30, 1998, on or around June 30, 1998, more than one year prior to filing, she received artwork from the Debtor after paying her approximately \$10,000. Both Schneier and Gerald P. Dagostino, C.P.A., signed the note as witnesses. At trial, Dagostino testified that he did not recall signing the document but his usual business practice was to sign documents on or near the date reflected on them. The document itself is confusing. Although it purports to be Ms. Schneier’s written promise to pay the Debtor \$10,000 for artwork, pictures and paintings, the Debtor signed the document as a guarantor.

Confusing the artwork sale matter more is a transcript of the Debtor’s November 15, 2000 deposition. She testified she intended to sell her the artwork, then analogizes the transaction to the second mortgage her mother had obtained on the Debtor’s house. Later on she testified that if the payments provided for in the agreement had been made, her mother would not have had any right to the artwork because the Debtor would not have owed her any money, but then stated she did not know if the artwork was the security for the payment of her debt to her mother. (*See* Ex. 6 pp. 64-66.)

Schneier testified the Debtor used the \$10,000 to pay for surgery the Debtor needed to lessen the harmful physical effects resulting from a damaged silicon implant and to keep her business afloat during her recovery. She also testified she did not have sufficient room in her home initially to take possession of the artwork. Prior to moving to Rochester and after her husband recovered from a heart attack, Schneier had the artwork removed from the Debtor's residence with the help of family and friends. Once she took possession of it, she retained it.

One part of Schneier's testimony the court found disturbing was her description of the Plaintiff's harassment of her and her family, including the Debtor. Schneier recounted the time the Plaintiff sent police to her house and the numerous occasions he threatened her and her family on the phone. The only other aspect of the Plaintiff's case in chief worth noting is his Exhibit 13, particularly the document captioned "Preferred Capital 'Schedule A'" ("P.C. Schedule A"). The P.C. Schedule A states it is a lease between Preferred Capital Corporation and National Health Network, Inc. and lists the equipment it covers, including a 2-door freezer and 3-door cooler from Albany Restaurant.

Before the trial concluded, the court read a quote from its *Raymonda*⁶ decision. In doing so, it intended to emphasize the heavy burden placed upon a party objecting to a discharge and to comment on what it perceived as a lack of proof regarding the Plaintiff's section 727(a)(2) and section 727(a)(4) causes of action. (*See* Tr. 215-217; 220-221.)

Arguments

In his opening brief, the Plaintiff contends the Debtor should be denied a discharge pursuant to

⁶Case No. 00-90060, Adv. Proc. No. 99-91199 (Bankr. N.D.N.Y. 2001).

11 U.S.C. § 727(a)(4) for knowingly and fraudulently making a false oath or account regarding the existence, ownership, possession and value of artwork, some restaurant equipment, the “Mr. Shoes” trade name and the oil painting called “Michael.” He asserts she did not list the art as a secured debt on the bankruptcy petition so she could remove the collection from the court’s purview and purchase it back at any time. The Plaintiff goes on to state the Debtor is a beneficiary under her mother’s will and stands to inherit the art back; he references his “Appendix D - “Secret Benefit.” In that document, he recites a part of the Debtor’s November 15, 2000 deposition where she testified she was a beneficiary under her mother’s life insurance policy.

The Plaintiff also asserts the Debtor should not receive a discharge based on 11 U.S.C. § 727(a)(3) for concealing information or failing to preserve recorded information regarding her financial condition or business transactions, particularly the value of her art collection. He also argues a denial of her discharge is warranted pursuant to 11 U.S.C. § 727(a)(5) for failing to explain the loss of assets or deficiency of assets to meet her obligations, in particular, the equipment purchased from Albany Restaurant.

Raised for the first time in a part of his opening brief labeled “Merger Agreement,” the Plaintiff contends NHO’s bankruptcy was fraudulent. He does not, however, provide any statutory or case law analysis to support this contention.

In her response to the Plaintiff’s opening brief, the Debtor asserts the Plaintiff has not met his burden of proof on any of the section 727 causes of action, including the gravamen of his complaint, section 727(a)(4). Regarding section 727(a)(2), she argues the Plaintiff has not proven that any of her or NHO’s property had been, or was permitted to be, transferred, removed, destroyed, mutilated, or

concealed within one year before the date of filing with the intent to hinder, delay, or defraud a creditor. According to the Debtor, the evidence shows any sale of an asset was for fair consideration and the proceeds were used for her or NHO's legitimate expenses.

Regarding section 727(a)(3), the Debtor contends the Plaintiff has submitted no evidence of what "recorded information" she concealed, destroyed, mutilated, falsified or failed to keep from which her or NHO's financial condition or business condition might be ascertained. She asserts her uncontradicted testimony and that of her mother are that 33 banker boxes of books and records were provided to the parties in interest. According to her, she did not provide the Plaintiff with an appraisal of the artwork because she had no such appraisal, thus, she had no "recorded information."

The Debtor also contends the Plaintiff did not meet the requirements under sections 727(a)(5) or 727(a)(7) because she cooperated in the NHO bankruptcy proceeding and satisfactorily explained the loss or deficiency of assets. To her, assets were not lost, rather, the assets were the lease agreements she listed on the bankruptcy petition and not the equipment pieces referred to in those lease agreements. She argues the Plaintiff has not submitted any evidence that those assets were worth any less at the time of filing than they were worth at the time of the lease agreements' inception. For the Debtor, her testimony and that of one of the Plaintiff's witnesses support a finding that approximately one month before the filing of the petition, most of the equipment was on the former NHO premises after they were vacated, that equipment was locked up and, later, a new tenant used it. She asserts the equipment lessors did little to retrieve and liquidate the equipment post petition and contends the Plaintiff has not produced any documentation or other evidence demonstrating that she transferred, liquidated, or otherwise disposed of any of the leased equipment prior to the filing of the NHO petition.

She also contends he has not shown she received a benefit from such transfer, liquidation or disposition.

As for the Plaintiff's main contention, his section 727(a)(4) argument, the Debtor begins by challenging his interpretation of what happened at her section 341 meeting. She points out that not only did the court admit the transcript of that meeting for the limited purpose of impeachment, but even if it had been received as direct evidence, there is no evidence her statement, made while surrounded by several individuals, was made "knowingly" and "fraudulently." She contends there is no evidence of a secret deal between her and her mother which shows she retained a legal or beneficial right to the artwork, that her mother gave her anything other than fair value for it and that she used the proceeds for anything other than her surgery and business's expenses. She cites *Cullinan Assocs., Inc. v. Clements*, 215 B.R. 818 (W.D. Va.), *aff'd*, 131 F.3d 133 (4th Cir. 1997), and argues her mistaken statement is different from the one the debtor made in *Raymonda* because in that case the debtor had sufficient time to consider the simpler questions posed. In contrast, she asserts she did not have sufficient time to consider all of the "in the last six years" questions she was asked. Furthermore, unlike the debtor in *Raymonda* who still had and used the tools when he filed, the Debtor sold the artwork more than a year prior to filing her petition and did not possess it when she did file.

Regarding the "Michael" painting, the Debtor asserts her amended schedule was a defensive move by her so that if she had any rights in the painting, those rights were disclosed. The Debtor's response to the Plaintiff's challenge regarding the "Mr. Shoes" transaction is that the uncontradicted testimony shows the proceeds of the Hi-Step Enterprises, Inc. sale of its assets, including the Mr. Shoes name, to Zylos, Inc. was for fair value and used to pay tax creditors of that non-debtor entity.

The Debtor contends the Plaintiff's papers acknowledge and concede that she relied on her attorney with regard to her deposition testimony regarding who owned the "Mr. Shoes" trade name.

Distinguishing *Raymonda* once again, the Debtor states she never owned the trade name "Mr. Shoes" and argues that because the transaction involved two non-debtor entities, it is not a matter which "include[s] the debtor's business transactions and the discovery of assets or the disposition of the debtor's property." She further argues the Plaintiff has not submitted any expert opinion or documentary evidence which shows the values of the corporations' stocks disclosed by her were worth anything other than zero. According to her, the zero value of the stock was corroborated by Saltzman's failure to make an offer to purchase all the entities' ownership interests.

In his⁷ reply brief, the Plaintiff presents the court with a case law analysis that discusses *Raymonda* in more detail and distinguishes the cases the Debtor relies on in her opening brief. Although he lists 19 areas where the Debtor "misrepresents, deletes or provides directly contradicting testimony," overall he focuses on the Debtor's transfer and concealment of her artwork and the "Mr. Shoes" trade name and the absence and concealment of business equipment. (Plaintiff's Response to Defendant's Post-Trial Memorandum ("Response") unnumbered p. 2.) In his introduction, he also contests the Debtor's right "to declare corporate bankruptcy," arguing "[w]ithout the forged, invalid Merger Agreement in place both the Natalie and NHO bankruptcies immediately unravel." (Response unnumbered p. 1.)

⁷The pronoun the Plaintiff uses when referring to the party pursuing the objection to discharge causes of action is "we." The convoluted format and content of his two briefs, especially his "appendices" and his "supplements," make them extremely difficult to follow and do not indicate who, if anyone, might be an additional plaintiff.

The Plaintiff also challenges the Debtor's explanation of the loss or deficiency of assets, her characterization of the leases as assets, her offer to make them available to parties in interest, her failure to provide a list of every piece of equipment (leased or owned) and her representations that either the new tenant or the landlord had the equipment. Regarding the Debtor's assertion that there is no proof that Albany Restaurant provided any equipment to her or NHO, he refers to Exhibit 13, particularly the agent's finding regarding 75% of the equipment, not 100%. He downplays the leasing companies' lack of action and the Debtor's inability to access the premises once she filed and he argues that if the leasing companies had abandoned equipment, then it should go into the estate to pay the Debtor's creditors. He also argues Exhibit 9 supports a finding that the Debtor's assets dropped from the \$650,000 value she placed on them within a year of filing.

Finally, the Plaintiff asks the court to take judicial notice of seven facts. He lists them in a document labeled "Appendix C - Public Record Appendix."

Discussion

I. Validity of the NHO Petition

The Plaintiff did not formally object to the filing of NHO's petition until he challenged their validity in his post trial briefs. Moreover, he neither substantiates his argument with uncontested facts nor provides supporting case law. While the court often conducts its own research when deciding issues, it is certainly not responsible for making a party's prima facie case, especially when that party is represented by counsel. Thus, this issue will not be considered by the court.

II. Judicial Notice

The Plaintiff also did not ask the court to take judicial notice of seven "facts" until he filed his

reply brief.⁸ Although the Federal Rules of Evidence provide for “mandatory” judicial notice of adjudicative facts, the request itself does not merit serious consideration given the Plaintiff’s failure to supply the court with the necessary information. FED. R. EVID. 201(d). Merely indicating “anyone can call or visit” is not sufficient when the burden of collecting the information lies with the proponent, not the court, particularly when phone numbers or addresses have not been provided.

Furthermore, at least one of the “facts” cannot be ascertained by a mere phone call since state taxing authorities cannot release taxpayer information in the absence of a proper judicial order. *See* N.Y. TAX L. § 202. If the court followed the state law requirements and entertained issuing an order, it would not execute one without first providing the Debtor with an opportunity to be heard. Also, although the federal rules allow for a request at any time, the timing of the request seems to be part of the Plaintiff’s answer to the challenges the Debtor raised in her brief, i.e., his attempt to fix what he missed getting into evidence prior to the close of trial.

The court does not hold the Plaintiff’s seven “facts” are “self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities.” *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347-48 (5th Cir. 1982). Accordingly, the request is denied.

III. Objections to Discharge

As the court has already pronounced, the denial of a discharge is not only an extremely drastic and harsh sanction, it is the death penalty of bankruptcy. *Raymonda*, at p. 4. Like many other

⁸When a plaintiff raises a new issue in a reply brief, the court usually allows the defendant to file a brief addressing it. For reasons that will become apparent, the court did not allow the Debtor to do that in this proceeding.

objection to discharge adversary proceedings, the matter here involves two vital bankruptcy maxims: the debtor's paramount duty to fully and accurately prepare his or her petition, schedules and statements and the Bankruptcy Code's purpose of giving a deserving debtor a fresh start. *Id.*

While all of the policy precepts of *Raymonda* apply to this case, a material factual distinction between this case and *Raymonda* is that the Trustee has not asserted the Debtor failed to disclose assets or other information on her bankruptcy petition or the NHO bankruptcy petition. The individual challenging the Debtor's discharge is her former boyfriend. Although he is a creditor of the Debtor, compared to the similar creditor bodies in the two cases, his claim is very small. Moreover, unlike the more typical scenario of the Chapter 7 estate's fiduciary objecting to a debtor's discharge, this matter smacks of a jilted fellow's attempt at revenge or retaliation against his former girlfriend, with many attempts at tripping her up along the way. After careful consideration of the entire record, with particular attention paid to the Plaintiff's post trial briefs and appendices, the court concludes the Plaintiff did not meet his burden of proving, by a preponderance of the evidence, that the Debtor should not receive a discharge.

A. 11 U.S.C. § 727(a)(2)

Bankruptcy Code § 727(a)(2) provides for the denial of a discharge if:

[T]he debtor, with 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 had 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; or
- (B) property of the estate, after the date of the filing of the petition.

The Plaintiff's brief does not contain any argument supporting an objection to discharge pursuant to § 727(a)(2). As for the Debtor's sale of her artwork, the Plaintiff did not offer any testimony that the sale of it was for other than fair consideration or that the proceeds were used for anything other than her or her business's legitimate expenses. Thus, any causes of action based on it are dismissed.

B. 11 U.S.C. § 727(a)(3)

Bankruptcy Code §727(a)(3) provides for a denial of discharge if:

[T]he 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.

Of course, sophisticated debtors are held to a higher level of accountability. *In re Sethi*, 250 B.R. 831 (Bankr. E.D.N.Y. 2000). In the instant case, however, the Debtor has a ninth grade education and, prior to her involvement with the Plaintiff, the extent of her business practice was selling fruit baskets from her home. As already found, the uncontradicted testimony was the parties in interest received, but have yet to return, 33 banker boxes of books and records, including corporate and personal tax returns, bank statements, business checks, personal checks, corporate books and Quickbook reports. Although the Debtor did not provide the Plaintiff or the Trustee with an appraisal of the artwork, she did not do so because she did not have one. Unlike the tax returns and the books and records she was required to keep according to federal and state law, the Plaintiff has not convinced the court that the Debtor was required to obtain and retain an appraisal. Thus, he has failed to prove a section 727(a)(3) cause of action.

C. 11 U.S.C. § 727(a)(4)

The gravamen of the Plaintiff's objection is based on Bankruptcy Code §727(a)(4). Section 727(a)(4) provides for a denial of discharge if:

- [T]he debtor knowingly and fraudulently, in or in connection with the case –
- (A) made a false oath or account;
 - (B) presented or used a false claim;
 - (C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
 - (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs.

As the statute provides, the false oath or account must be both knowingly and fraudulently made and it must relate to a material matter, including the debtor's business transactions and the discovery of assets or the disposition of the debtor's property. *See In re Murray*, 249 B.R. 223 (E.D.N.Y. 2000).

The Plaintiff argues the Debtor left several items off of her petition, schedules and statements.

They are treated in greater detail below:

1. The Artwork

The Plaintiff asserts the Debtor lied about artwork she either owned when she filed or transferred within six years of filing on several occasions. Each occasion is addressed below:

a. The Meeting of Creditors

The Plaintiff asserts the Debtor did not disclose the transfer of artwork at her § 341 meeting. To start, the transcript of the meeting was admitted for the sole purpose of impeachment, not as direct evidence. Even if the court accepted it as direct evidence, the Plaintiff does not point to any evidence

to show her statement, made while surrounded by as many as 11 individuals, was made knowingly and fraudulently. There is no evidence the Debtor made any unusual transaction or deliberately covered her tracks, no evidence of a secret deal between her and her mother where she retained a legal or beneficial right to the artwork and no evidence her mother gave the Debtor anything but fair value for the artwork. The Plaintiff has not even supported his contention that the Debtor will inherit the art under her mother's will.

As for the proceeds the Debtor and her mother say she received, the only evidence in the record regarding them is the Debtor used them for her surgery and NHO's business expenses. The Debtor's confusion, nervous state or misunderstanding of the compound question she was asked at the section 341 meetings does not support a determination that a fraudulent misrepresentation occurred. *See Cullinan Assocs., Inc.*, 215 B.R. at 821. The context of the Debtor's "statement" is different from the debtor's in *Raymonda*. Here, the Debtor was not asked straightforward questions like "do/did you own paintings?" and "where are they now?" Rather, the series of questions asked involved broad, legally-worded queries which required the Debtor to recall "transactions" involving art and numerous other assets she allegedly owned during the six years prior to filing. The line of questioning prompted her attorney to ask clarifying questions. Given the context, especially Rudin's interruptions and involvement, the court does not infer fraudulent intent by the Debtor. *See Murray*, 249 B.R. at 228.

b. The Schedules and Amended Schedules

The same rationale applies with regard to the Debtor's Amended Schedule B. The Debtor did not disclose the existence of any artwork until she filed her Amended Schedule B, however, her credible testimony regarding the amendment is that she filed it to reflect the existence of the "Michael"

painting, i.e., art belonging to her son. Furthermore, the Plaintiff has failed to prove, by a preponderance of the evidence, that she actually owned artwork when she filed.

c. The January 2000 Affidavit (Exhibit 7)

Although the Debtor's otherwise fairly credible story is once again supported by Exhibit 7, her January 2000 affidavit, Exhibit B arguably compromises it. In her affidavit she swears the artwork she sold in 1998 was only worth \$500. However, Exhibit B, the promissory note between herself and her mother, and the testimony of the Debtor and her mother indicate she might have received as much as \$10,000 for it.

To the court, if in her affidavit the Debtor had stated she had **received** \$500 instead of stating what the value of the artwork was **worth** when she transferred it, the weight of the evidence behind the promissory note would have created quite a significant discrepancy in her story. Without the "received" statement, however, the court views the promissory note as evidence that the Debtor's mother paid approximately \$9,500 too much for the artwork, in effect, gifting the Debtor that money so she could pay for her surgery. Due to the lack of any evidence in the record evidencing the various paintings and lithographs had a higher value when the Debtor transferred it to her in exchange for money for her medical and business expenses, the court does not find she lied in that affidavit. Thus, Exhibit 7 does not support a section 727(a)(4) determination.

2. The "Mr. Shoes Pizza" Trade Name

To the court, the only evidence the Plaintiff has to support a denial of discharge pursuant to section 727(a)(4) centers on the trade name "Mr. Shoes Pizza." As already found, the Debtor filed an affidavit dated January 28, 2000 in which she swore that Hi-Step Enterprises, her sole corporation,

“never owned” the Mr. Shoes Pizza trade name. Yet, the Asset Purchase Agreement between Hi-Step and Zylos, even with its effective date discrepancy, reflects a sale of Hi-Step’s assets to her mother’s corporation, including that trade name. That agreement supports a finding that the Debtor’s affidavit contained a false statement about an asset her non-debtor corporation owned.

Meeting section 727(a)(4)’s requirements that (1) the debtor made the statement under oath and (2) the statement was false, however, does not end the inquiry. *See In re Martin*, 208 B.R. 799, 805 (N.D.N.Y. 1997); *Raymonda*, p. 5 (citing *In re Scott*, 233 B.R. 32 (Bankr. N.D.N.Y. 1998) and *In re Kelly*, 135 B.R. 459 (Bankr. S.D.N.Y. 1992)). The Plaintiff also has to prove criteria three through five, namely: (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy. *Id.* According to the Second Circuit, testimony given “knowingly and fraudulently” means nothing more than “an intentional untruth in a matter material to the issue which is itself material.” *In re Melnick*, 360 F.2d 918, 920 (2d Cir. 1966)(citing *In re Slocum*, 22 F.2d 282, 285 (2d Cir. 1927)).

To the court, the Debtor knew her May 2000 “never owned” statement was false when she made it. Of course, a debtor is unlikely to admit to an intentional false statement, therefore, the creditor may prove “knowledge” for purposes of section 523(a)(4)(A) by proving the debtor acted with reckless disregard for the truth. *In re Scott*, 233 B.R. at 44 (citing *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998)). Here, while it is true the Debtor’s attorney and not the Debtor herself answered essentially all of the questions regarding the ownership of the Mr. Shoes Pizza trade name during the April 24, 2000 deposition, the court finds the Debtor knew her January 28, 2000 affidavit contained the false statement when she signed it based on the extent of the documentation involved with the sale

of that trade name and her ownership of Hi-Step. The court cannot find the Debtor, as sole owner of Hi-Step and the one who executed the sale documents on its behalf as president, did not know Hi-Step owned the Mr. Shoes Pizza trade name approximately one month before she filed. In light of the timing of the sale and the documentation behind it, any denial of knowledge by her would be both internally inconsistent and implausible and a reasonable factfinder would not credit it. *See In re Chavin*, 150 F.3d at 728.

Even a deliberately false statement, however, may not support a denial of discharge under section 727(a)(4) since the debtor must have also made the statement fraudulently. *In re Scott*, 233 B.R. at 44. Because it is difficult to prove directly, courts have allowed creditors to prove fraudulent intent using circumstantial objective evidence. *Id.* (citing *In re Devers*, 759 F.2d 751, 754 (9th Cir. 1985)). Whether the debtor derived a benefit or the creditor a detriment is often one of the most important circumstantial factors to consider. *Id.* (citing *In re Agnew*, 818 F.2d 1284, 1287 (7th Cir. 1987)). As a result, courts may consider materiality as a proxy for fraudulent intent. *Id.* (citing *In re Chavin*, 150 F.3d at 728).

Here, the circumstantial evidence persuades the court that the Debtor did not have the requisite fraudulent intent. The Debtor's story is the proceeds of the sale constituted fair value and were used to pay Hi-Step's tax creditors. Although the Debtor did not provide any documentation to support that, the Plaintiff's only challenge to it is based on information that is not part of the record, i.e., Appendix C - Public Record Appendix Fact #1. Furthermore, the court finds the Debtor heavily relied on Rudin when testifying that the Mr. Shoes Pizza trade name did not belong to Hi-Step. In fact, Rudin himself "testified" on quite a number of occasions during the Debtor's depositions.

Despite the Plaintiff's analogy, his prima facie case is not at all like the one the trustee presented in *Raymonda*. There, in addition to all the contradictions and inconsistencies, when questioned by the trustee at his adjourned § 341 meeting, the debtor was, as conceded by his own attorney, slow to disclose the existence of the tools. *Raymonda* at p. 7. Later, when testifying in court during the trial, the debtor readily admitted the trustee would never have found out about the tools if his ex wife had not noted their existence. *Id.* On the other hand, the Plaintiff's prima facie case did not leave the court with the same flippant, teeth pulling impression of the debtor that the trustee's presentation in *Raymonda* did. *See id.* at p. 8.

Furthermore, in *Raymonda*, the debtor retained the use and benefit of the assets he owned. *Raymonda*, at p. 5. Here, the Debtor herself never owned the trade name Mr. Shoes Pizza. Her asset, the stock of Hi-Step, was disclosed on her schedules and valued at zero. Even though she produced boxes of information, the Plaintiff did not produce an expert valuation or any other evidence to show that her stock was worth anything other than zero.

Although courts have inferred fraudulent intent from circumstantial evidence, the circumstances here do not warrant such a holding. *See In re Freudmann*, 362 F.Supp.

429, 433 (S.D.N.Y. 1973), *aff'd*, 495 F.2d 816 (2d Cir. 1974). The Second Circuit has determined the following circumstances constitute "badges of fraud":

- (1) the lack or inadequacy of consideration;
- (2) the family, friendship or close associate relationship 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 a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or

pendency or threat of suits by creditors; and
(6) the general chronology of the events and transactions under inquiry. *In re Kaiser*,
722 F.2d 1574 (2d Cir. 1983)(citing *In re May*, 12 B.R. 618 (Bankr. N.D. Fla.
1980)).

Based on the findings and determinations already made, the court concludes the Plaintiff has not shown what badges of fraud exist here. Although the transfer was from the Debtor's corporation to her mother's corporation, the record does not contain any evidence to support a finding that either individual treated her corporate business as her own thereby deriving a personal "benefit" from the transaction.

Finally, the court recognizes once the creditor shows an intentional falsehood, "the burden falls upon the debtor to come forward with evidence that it was not an intentional misrepresentation. If the debtor fails to provide such evidence or a credible explanation for his failure to do so, a court may infer fraudulent intent." *Raymonda*, at p. 7 (quoting *In re Murray*, 249 B.R. at 228). The court accepts the Debtor's explanation that her mother's corporation purchased the trade name as part of a larger sale and, based on the absence of any evidence to the contrary, paid sufficient consideration for it. Therefore, the Debtor has rebutted the inference of fraudulent intent. *Murray*, 249 B.R. at 228.

The egregious facts in *Raymonda* simply do not exist here. The lack of evidence coupled with the Debtor's attorney's apparent role in her business and her mother's role in both her personal and business life, leads the court to conclude that what the Debtor "intended," if anything, was to obtain money for her non-debtor business's assets and to place the trade name "Mr. Shoes Pizza" back into her mother's business where she had always been told it belonged. Having received no direct or indirect benefit, the court does not conclude she intended to defraud her creditors, thus, the causes of

action based on § 727(a)(4) are also dismissed.

D. 11 U.S.C. § 727(a)(5)

Bankruptcy Code § 727(a)(5) provides for a denial of discharge if:

[T]he debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.

The Debtor has satisfactorily explained the loss of assets or deficiency of assets. The Plaintiff is apparently confused as to what constitutes an asset of a bankruptcy estate. Since the equipment was leased by the Debtor and/or her corporations, the personal property itself would not constitute estate property. The leases, however, would. In general, leases of personal property do not have much, if any, value, thus, the court would not necessarily view a debtor's mistake in not listing them on a Schedule B as fatal to receiving a discharge.

Given the Debtor's production of 33 boxes of personal and business records, there is nothing in the record to suggest she did not provide all the recorded information of her and NHO's business transactions. Furthermore, the Plaintiff has not submitted any evidence that the equipment leases were worth less at the time of filing than they were worth at the time of inception of the lease agreements.

Even if the court assumed the assets consisted of the equipment as opposed to the lease agreements, the Debtor's uncontradicted testimony was that approximately one month before the filing of the petition, the equipment was locked upon the premises. Although they are favorable to the Debtor's side of the story in large part, the court perceives all of the testimony from the equipment lessors as nothing more than solicitations by the Plaintiff to provide one or two sentence statements without substantiation or explanation. If the equipment lessors had determined the Debtor had violated

their rights, why not exercise their own rights under state law prior to her bankruptcy filing and/or under the Bankruptcy Code after she filed? The court has also been left with the impression that the Plaintiff himself assisted in the acquisition of equipment and that he managed and controlled the businesses' day-to-day operations, at least until the day he and the Debtor parted company. If that is true, then arguably, he contributed to any diminution in value.

Finally, the Plaintiff has not provided any evidence that there was a loss or deficiency of assets prior to the Debtor and NHO filing bankruptcy petitions. He has not produced any documentation or other evidence demonstrating the Debtor transferred, liquidated or otherwise disposed of any of the leased equipment prior to the filings or received a benefit from a transfer or disposition. The only evidence offered is the Debtor's and some of the equipment lessors' testimonies that the landlord possessed the equipment post petition. Thus, the court concludes the Plaintiff has not met his burden of proving a section 727(a)(5) cause of action.

E. 11 U.S.C. § 727(a)(7)

Bankruptcy Code § 727(a)(7) provides for a denial of discharge if:

[T]he debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case under this title or under the Bankruptcy Act, concerning an insider.

The provision was designed to induce the cooperation of individuals in related bankruptcy cases. *See In re Krehl*, 86 F.3d 737 (7th Cir. 1996). Section 727(a)(7) binds ““related cases together so that misconduct in one case by an individual may be chargeable against that individual in other related proceedings.”” *In re Transp. Mgmt Inc.*, 278 B.R. 226, 238 (Bankr. M.D. Ala. 2002)(quoting

Whiteside F.S., Inc. v. Siefkin, 46 B.R. 479, 480-81 (N.D. Ill. 1985). Thus, the section acts to prevent debtors who are involved in several bankruptcy proceedings from failing to cooperate in proceedings in which their discharges are not at issue, and then, subsequently or simultaneously, obtaining individual discharges in their own cases. *Id.*

As the court has found, above, the Debtor cooperated with the Trustee in the NHO bankruptcy case. She even turned over boxes of information to creditors. Thus, the Plaintiff has not sustained his burden of proof on his section 727(a)(7) cause of action.

Accordingly, it is

ORDERED that the Plaintiff's objections to the Debtor's discharge are overruled and the Debtor shall receive her discharge forthwith.

Dated:

Albany, New York

Honorable Robert E. Littlefield, Jr.
United States Bankruptcy Judge