UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:
PETER J. MOLLO,

Debtor(s).

Chapter 7
Case No. 14-11225

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2,

Plaintiff(s),

vs.

Adv. Pro. No. 14-90049

PETER J. MOLLO,

Defendant(s).

APPEARANCES:

WILLIAM K. HARRINGTON
United States Trustee, Region 2
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Assistant United States Trustee

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

MEMORANDUM-DECISION AND ORDER

The current matter before the court is the adversary complaint filed by William K. Harrington, United States Trustee for Region 2 ("Trustee" or "Plaintiff") requesting that Peter J. Mollo ("Debtor" or "Defendant") be denied a discharge pursuant to 11 U.S.C. § 727(a)(2)(A), (a)(2)(B), (a)(3), (a)(4)(A), and (a)(5).[1] For the reasons that follow, the court denies the Debtor's discharge.

[1] All section references refer to title 11 of the United States Code, unless otherwise noted.

PROCEDURAL BACKGROUND

The Plaintiff commenced this adversary proceeding on December 29, 2014, and on January 27, 2015, the Debtor filed an answer denying the allegations of the complaint. The court issued a second amended scheduling order on July 8, 2015, which set a trial for September 9, 2015, and directed that expert witness reports be served on or before August 10, 2015. The amended order also mandated that pretrial submissions, including the identity of all witnesses along with a brief summary of their anticipated testimony, be served on or before September 2, 2015. The deadline for pretrial submissions was later extended by the court to September 3, 2015. The Debtor did not file pretrial submissions. On September 8, 2015, at approximately 2:30 p.m., the Trustee was served via electronic mail with the Debtor's expert report prepared by Dr. Xu Chen. Dr. Chen was never disclosed as an expert witness, nor was he available to testify. At the start of the trial, the court granted the Trustee's oral motion in limine to exclude Dr. Chen's untimely report based upon prejudice to the Trustee. At the conclusion of trial, the court directed that the parties file post-trial submissions in support of their positions, and this matter was taken under advisement.

JURISDICTION

The court has jurisdiction over this core matter pursuant to 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(J), and 1334(b). Pursuant to Federal Rule of Bankruptcy Procedure 7052, this Memorandum-Decision and Order sets forth the court's findings of fact and conclusions of law.

FACTS

The following facts are derived from the record before the court, including the parties' Joint Stipulation of Facts ("Jt. Stip.," ECF No. 31), the testimony of the Debtor, who was the only witness called to testify at the trial, and the documents submitted into evidence.

1. At the time of trial, the Debtor was 69 years old. (Trial Tr. 79, Sept. 9, 2015, ECF No. 37.) He graduated from Georgetown University in 1967. (Trial Tr. 13.) He obtained a teacher's certificate from Hunter College and, later, a Masters and Doctorate in Educational Administration from Columbia University. (Trial Tr. 13-14.) The Debtor worked for the New York City Board of Education where he was director of the family counseling program for approximately 12 years. (Trial Tr. 14.)
2. In 1989, the Debtor obtained a J.D. from Brooklyn Law School. (Trial Tr. 14.) After graduating and passing the New York Bar Examination, the Debtor practiced on his own as a general practitioner from 1989 until early 2012. (Trial Tr. 14; Jt. Stip. ¶ 43.) His office was located at 266 Smith Street in Brooklyn, New York (the "Smith Street Property"). (Trial Tr. 14.) From approximately 1995 through 2011, the Debtor filed over 400 bankruptcy cases. (Jt. Stip. ¶ 44.) The vast majority were consumer cases. (Jt. Stip. ¶ 44.)
3. The Debtor was suspended from the practice of law by the Supreme Court of New York, Second Department on January 9, 2012, and the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts was authorized to institute and prosecute a disciplinary proceeding against him. *In re Peter J. Mollo*, Case No. 2010-07363 (N.Y.A.D. 2d Dept. June 9, 2012). (Jt. Stip. ¶ 45.) On February 2, 2012, the United States District Court for the Eastern District of New York suspended the Debtor from the practice of law in that court. *In re Peter J. Mollo*, 12-00070-BMC. (Jt. Stip. ¶ 47.)

4. On or about February 2, 2012, the Debtor voluntarily resigned from the New York bar and, thereafter, was disbarred. (Jt. Stip. ¶ 48.) At about this time, the Debtor began a divorce mediation business. (Trial Tr. 69.)

5. The Debtor filed a voluntary petition for relief under Chapter 7 in the Bankruptcy Court for the Eastern District of New York on May 26, 2014, under Case No. 14-42630. (Jt. Stip. ¶ 1.) On May 30, 2014, the case was transferred based upon the Debtor's residency to the Northern District of New York and assigned Case No. 14-11255. (Jt. Stip. ¶ 1; Trial Tr. 20.)

6. The Debtor testified that he filed for bankruptcy protection because someone had obtained a judgment against him in small claims court, and the sheriff showed up outside his office in Brooklyn. (Trial Tr. 18.) The Debtor said he wanted the sheriff to go away. (Trial Tr. 19.) He stated that he panicked and filed shortly after the sheriff showed up, but the Debtor could not recall if it was a day, or a week later that he filed. (Trial Tr. 20-21.) He admitted he filed quickly and carelessly, knowing that if there were deficiencies, he would correct them. (Trial Tr. 18-20.)

7. The petition, Declaration Concerning Debtor's Schedules, and Line 57 of the Means Test all evidence the Debtor's electronic signature and were all signed under penalty of perjury. (Case No. 14-11225, ECF No. 1.) The Debtor declared that the information contained in the referenced document is true and correct. The Debtor's Declaration Re: Electronic Filing states, in part, "the undersigned debtor(s), hereby declare under penalty of perjury, the information I have given my attorney and the information provided in the electronically filed petition is true and correct." (Case No. 14-11225, ECF No. 1.) The Declaration also contains the Debtor's electronic

signature. It is unclear whether the Debtor read the petition and related documents before he signed them. (Trial Tr. 106-107.)

8. The following information was missing from the petition: type of debtor; how the filing fee was being paid; Chapter under which the case was filed; nature of the Debtor's debts; information regarding Exhibit D; and information regarding venue. (Jt. Stip. ¶ 2.) On May 30, 2014, the Court Clerk issued a Notice of Deficient Documents (Case No. 14-11225, ECF No. 3) listing the deficiencies and advising the Debtor to file an amended voluntary petition with the missing information added by June 3, 2014. (Jt. Stip. ¶ 2.) The Debtor testified that he was not aware of the deficiencies related to the petition at the time it was filed. (Trial Tr. 86-87.)

9. On May 30, 2014, the Court Clerk issued a Notice of Deadlines (Case No. 14-11225, ECF No. 2) setting forth the following deadlines: Credit Counseling Certificate - 6/2/2014; Certification of Matrix - 6/13/2014; Payment Advice Statements - 6/13/2014; Exhibit D - 5/30/2014; and Amended Schedules I and J - 6/13/2014, as the Debtor had used outdated forms. (Jt. Stip. 3.)

10. The Notice of Deficient Documents and Notice of Deadlines were served upon the Debtor on June 2, 2014. (Case No. 14-11225. ECF Nos. 4, 6.) The Debtor never corrected the deficiencies in the petition (Jt. Stip. ¶ 2), nor did the Debtor file a certificate of credit counseling,[2] payment advices, or Exhibit D (Jt. Stip. ¶ 5).

[2] Section 109 sets forth the requirements that an individual must satisfy to be eligible for bankruptcy. 11 U.S.C. § 109. Subsection (h) requires a debtor to receive credit counseling prior to filing a petition and, under §521 (b), an individual must provide proof by filing a certification of participation. 11 U.S.C. §§ 109(h) and 521(b). The court was unaware that the Debtor had not filed proof of credit counseling prior to the trial. Debtor's eligibility to file bankruptcy and, thus, to receive a discharge was not affirmatively raised at trial, and the court declines to raise the issue sua sponte.

11. The Debtor filed a Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management with the Petition (Case No. 14-11225, ECF No. 1) indicating he was exempt from the course requirement because he was in "[a]ctive military duty in a combat zone." (Jt. Stip. ¶ 22.) Debtor testified that he was not certain why he checked that box; he has never been in the army. (Trial Tr. 19.)

12. The first meeting of creditors was conducted by the Chapter 7 trustee on August 5, 2014. (Jt. Stip. ¶ 15.) The original meeting was adjourned for the Debtor to file an amended Schedule J ("Current Expenditures of Individual Debtor(s)") to clarify his monthly rent and to allow the Trustee to review, among other things, the circumstances surrounding the Debtor's filing. (Pl.'s Ex. 4, at 10-11; Jt. Stip. ¶ 15.) An adjourned meeting of creditors was held on November 4, 2014, and a representative of the Trustee was present. (Jt. Stip. ¶ 15.)

13. The Debtor lists no real property on Schedule A ("Real Property"). (Case No. 14-11225, ECF No. 1). He also testified that he owned no real property in 2013, the year prior to filing, but he took deductions on his 2013 return for real estate taxes of $7,500 and mortgage interest of $9,020. (Trial Tr. 44; Pl.'s Ex. 3.) The Debtor claimed this was a mistake made by his accountant who carried over information from a time when the Debtor owned the Smith Street Property. (Trial Tr. 44.)

14. The Debtor's Schedule B ("Personal Property") indicates that the Debtor does not own any interests in a business. (Jt. Stip. ¶ 25.) As of the bankruptcy filing and continuing post-petition, the Debtor owned 100% of the stock in "Peter J. Mollo Ed. D., Inc." (Jt. Stip. ¶ 35.) The Debtor confirmed this at the adjourned meeting of

creditors. (Jt. Stip. 35.) The Debtor used this corporation to conduct his divorce mediation business.

15. On or about September 19, 2014, prior to the adjourned meeting of creditors, the Debtor produced documents in response to the Trustee's inquiry dated August 11, 2014. (Jt. Stip. ¶ 35.) The documents included bank statements from a Signature Bank account maintained by Peter J. Mollo Ed. D., Inc. (the Signature Account") as of the bankruptcy filing and post-petition. (Jt. Stip. ¶¶ 35, 37.) The account statements produced covered the period November 1, 2013 through August 31, 2014. (Jt. Stip. ¶ 37.)

16. Schedule B also indicates that the Debtor does not have any checking, savings, or other financial accounts. (Jt. Stip. ¶ 23.) The Debtor was the sole authorized signatory on the Signature Account (Jt. Stip. ¶ 37), and the only one who made deposits into the account and ordered any wire transfers out of the account. (Trial Tr. 47). The Debtor testified that the Signature Account was not disclosed on Schedule B because he did not think he needed to disclose a corporate account. (Trial Tr. 32.)

17. The Debtor deposited more than $140,000 into the Signature Account during the one-year period prior to filing his petition. (Jt. Stip. ¶ 38.) The Debtor also made wire transfers during this period totaling approximately $75,000 from the Signature Account to an account at the USAA Federal Savings Bank ("USAA") titled in the name of Marcello Mollo, the Debtor's son. (Jt. Stip. ¶ 39.) During the post-petition period June 1, 2014 to August 31, 2014, the Debtor made wire transfers from the Signature Account to the USAA account in the approximate amount of $23,000. (Jt. Stip. ¶ 40.)

18. The Debtor first testified that the Signature Account was used "pretty much" solely for business purposes. (Trial Tr. 47.) When asked if there were times that the Signature Account was used for personal business, the Debtor responded, "[m]aybe." (Trial Tr. 47.) Later when asked if the Signature Account was used for business and personal purposes, the Debtor answered, "[y]es." (Trial Tr. 78.)
19. In addition to paying business expenses out of the Signature Account, the Debtor also used the account to pay the rent for his residence (Trial Tr. 110), life insurance premiums (Trial Tr. 70), installments to the IRS under a payment plan he negotiated (Trial Tr. 71-72), his cell phone bill (Trial Tr. 73), and the electric bill for his residence (Trial Tr. 74).
20. The Debtor testified that he deposited the rent checks he collected for his son and daughter from the tenants at the Smith Street Property into the Signature Account (Trial Tr. 48) and the fees he received from his divorce mediation business (Trial Tr. 58-59). The Debtor did not maintain a rent roll for the Smith Street Property because he could remember if a tenant had or had not paid rent. (Trial Tr. 63-64.) He also testified that his pension checks were usually deposited into the Signature Account (Trial Tr. 47), together with the funds he received in connection with his real estate license (Trial Tr. 52, 55, 62-63), amounts borrowed against his life insurance policies, and money a friend gave to him (Trial Tr. 56). When asked a second time why the Signature Account was not disclosed on Schedule B, the Debtor replied that not enough thought was given. (Trial Tr. 78.)
21. The Debtor did not disclose his real estate license or income generated as a broker in his schedules or Statement of Financial Affairs ("SOFA"). (Case No. 14-11225, ECF

No. 1.) When asked why it was not disclosed, the Debtor first testified it was because he hardly uses it and, then, answered, "[n]o, no reason." (Trial Tr. 61.) The Debtor did not maintain books and records with respect to his real estate license and real estate transactions. (Trial Tr. 78.)

22. As of the bankruptcy filing and continuing post-petition, the Debtor maintained a checking account at First Niagara Bank. (Jt. Stip. ¶ 36.) During the six months prior to filing for bankruptcy relief, the average balance in the account was approximately $500, and the balance in the account as of the filing date was $136.85. (Jt. Stip. ¶ 36.) When asked at trial, the Debtor had no explanation for not listing his First Niagara account and admitted it should have been disclosed. (Trial Tr. 31.)

23. The Debtor's Schedule B also indicates that the Debtor does not own any interests in insurance policies. (Jt. Stip. ¶ 24.) As of the bankruptcy filing and continuing post-petition, the Debtor owned certain whole life insurance policies through New York Life and Annuity Company. (Jt. Stip. ¶ 41.) Prior to filing for bankruptcy relief, the Debtor obtained loans from New York Life and Annuity Company against the policies. (Jt. Stip. ¶ 42.) The life insurance policies were discussed at the adjourned meeting of creditors, and the Debtor estimated their cash value to be approximately $1,000. (Jt. Stip. ¶ 41.) On April 29, 2015, the Debtor presented documentation reflecting a cash value of approximately $6,000. (Jt. Stip. ¶ 41.) The Debtor testified that he did not list the insurance policies because he had not paid the premiums for a long time, and he thought they had lapsed. (Trial Tr. 33-34, 76.) Additionally, he thought they had no value as he had borrowed as much as he could against them. (Trial Tr. 33-34.)

24. The Debtor's original Schedule I ("Current Income of Individual Debtor(s)") reveals monthly income of $5,329.04 comprised of wages, social security, and pension. (Case No. 14-11225, ECF No.1; Trial Tr. 43.) The Debtor did not schedule income from a business or broker's commissions. (Jt. Stip. ¶¶ 28-29.)

25. At the time of filing, the Debtor was still attempting to do divorce mediations through his corporation. (Trial Tr. 46.) The $866 a month in wages reported on Schedule I was derived from the Debtor's mediation business. (Trial Tr. 46.) The Debtor did not maintain books and records for his mediation business. (Trial Tr. 78.)

26. When asked to disclose year-to-date income on the SOFA, the Debtor only lists income of $10,400.00 from "counseling." (Case No. 14-11225, ECF No. 1.) The Debtor testified that income may have been from 2013, but he was not sure. (Trial Tr. 66.) When asked on the SOFA to supply the gross amount of income received during the two years immediately preceding the calendar year of the filing, the Debtor lists nothing. The Debtor's 2013 tax return shows adjusted gross income of $61,779. (Pl.'s Ex. 3.)

27. The Debtor resides on Whipoorwill Road in Hillsdale, New York. (Trial Tr. 35.) The property has an in-law apartment. (Trial Tr. 35.) At one time, the Debtor owned the Whippoorwill property, but he transferred it to his adult children approximately 12 years ago when he was going through a divorce. (Trial Tr. 36-37.) Since then, the Debtor has rented the property from his children. (Trial Tr. 37.) At the time of filing, a friend was living in the apartment. (Trial Tr. 36.) The tenant paid rent when he first moved in 6 or 7 years ago. (Trial Tr. 38.)

28. The Debtor testified that he paid rent to his children of $1,500 or $2,000. (Trial Tr. 37.) The Debtor could not explain why he initially listed his rent as $3,100 on Schedule J except to say it was a mistake. (Trial Tr. 37-38.) At the initial § 341 meeting, the Debtor testified the $3,100 payment was a mortgage payment. (Trial Tr. 39; Pls' Ex 4, at 5.) On September 22, 2014, the Debtor filed an Amended Schedule J reflecting a monthly rental expense of $1,550. (Case No. 14-11225, ECF No. 18; Jt. Stip. ¶ 32.)

29. The Debtor did not personally enter the data into the computer used to generate his petition, schedules, and SOFA, nor did he personally electronically file the documents using the court's ECF system. (Jt. Stip. ¶ 7.) However, he indicated that he dictated what was included in the filing, and his attorney, a close friend, and his stepson did him a favor by assisting him with the electronic filing because his electronic filing privileges had been terminated. (Trial Tr. 20, 21-24.) The Debtor was not charged a fee by the attorney. (Case No. 14-11225, ECF No. 1; Pl.'s Ex. 4, at 12; Trial Tr. 21.) The Debtor understood that he would be representing himself once the petition was filed. (Pl.'s Ex. 4, at 8; Trial Tr. 21-22, 101, 105.) Debtor's current attorney was retained to represent him in the adversary proceeding.

30. Included as part of the filed petition (Case No. 14-11225, ECF No. 1) are a partially completed Reaffirmation Agreement Cover Sheet and a partially completed Disclosure of Compensation of Bankruptcy Petition Preparer. (Jt. Stip. Nos. 9, 10.) The Debtor could not recall filing these documents with the petition. (Trial Tr. 90.)

31. The Debtor filed an Amended Schedule F to add creditors, an Amended Schedule J to clarify his monthly rent, an Amended SOFA to list additional lawsuits pending

against the Debtor, and associated documents on September 22, 2014 (Case No. 14-11225, ECF No. 18), after being asked to file them by the Trustee (Trial Tr. 92). The Debtor did not file the Declaration Concerning Debtor's Schedules with the amendments. (Jt. Stip. ¶ 16.)

32. The Debtor's original SOFA and the Amended SOFA omitted questions 19 – 25, as well as the Declaration Under Penalty of Perjury by Individual Debtor. (Jt. Stip. ¶ ¶ 17, 21.) On October 1, 2014, the Debtor filed the Declaration Concerning Debtor's Schedules and Declaration Concerning Debtor's SOFA. (Case No. 14-11225, ECF No. 22; Jt. Stip. ¶ 20.)

33. The Debtor's future income will consist of social security and pension. (Jt Stip. ¶ 52.)

34. The Debtor testified that he was a narcoleptic and not sleeping properly at the time the petition was filed. (Trial Tr. 17.) He asserted his condition caused him to crash his car on three occasions. (Trial Tr. 17.) He stated he was later diagnosed with sleep apnea and now uses a BiPAP machine to help him sleep at night. (Trial Tr. 17-18.)

35. The Debtor testified that he has been in therapy most of his adult life and was recently diagnosed with bipolar disorder. (Trial Tr. 79.) He indicated he had things under control until the last two years of his practice when he became a bit "crazy." (Trial Tr. 81.) He said his actions became exaggerated. (Trial Tr. 81.) He was quick to anger; he would interrupt, forget things. (Trial Tr. 81.)

36. The Debtor also testified that he intended to correct the omissions in his filings, but during the summer of 2014, his health problems persisted. (Trial Tr. 26.) He

indicated that he had hypertension, sleep apnea, and was near death most of the time. (Trial Tr. 26-27.)

ARGUMENTS

The Trustee argues the Debtor should be denied a discharge for concealing assets both pre-petition and post-filing and for making materially false statements under oath by failing to disclose his ownership interest in Peter J. Mollo, Ed. D., Inc., bank accounts at Signature Bank and First Niagara Bank, income from the operation of his business, wire transfers from the Signature Bank Account to his son's account, insurance policies, and his real estate license. The Trustee also asserts the Debtor's discharge should be denied for failing to maintain business records and to explain a loss of assets. As evidence of the Debtor's intent, the Trustee points to his pattern of conduct, namely, his failure to disclose significant assets and his continued concealment of assets post-petition.

The Debtor asserts that all of the shortcomings in his bankruptcy filing were the result of confusion and carelessness due to his psychological condition. At the time of the filing, Debtor asserts he was in a manic state; he was upset and not sleeping properly. Debtor contends that a psychologically impaired debtor should not be denied a discharge because of non-prejudicial errors and omissions in a petition that can be cured by amendment and examination. The Debtor argues there was no intent to defraud on his part and, if the court should find his conduct reckless, he should not be held accountable because such behavior is a symptom of bipolar disorder. Additionally, the Debtor claims he turned over all of the documentation the Trustee requested and that assets were discovered as a result of his disclosure. The Debtor states that this supports his position that he was not trying to hide anything.

DISCUSSION

Denial of Discharge

A discharge is reserved for the honest but unfortunate debtor. *D.A.N. Joint Venture v. Cacioli (In re Cacioli)*, 463 F.3d 229, 234 (2d Cir. 2006). A denial of a discharge "imposes an extreme penalty for wrongdoing." *State Bank of India v. Chalasani (In re Chalasani)*, 92 F.3d 1300, 1310 (2d Cir. 1996); *Darwin (Huck) Spaulding Living Trust v. Carl (In re Carl)*, 517 B.R. 53, 63 (Bankr. N.D.N.Y. 2014) (citation omitted) (A denial of discharge is the "death penalty of bankruptcy."). As a result, the provisions of § 727 are construed strictly against the party objecting to discharge and liberally in favor of the debtor. *In re Cacioli*, 463 F.3d at 234 (citation omitted). The objecting party bears the burden of proving the elements of each § 727 cause of action by a preponderance of the evidence. Fed. R. Bankr. P. 4005; *Grogan v. Garner*, 498 U.S. 279, 287 (1991).

Section 727(a)(4)(A)—False Oaths

A debtor will be denied a discharge if he "knowingly and fraudulently, in or in connection with the case—made a false oath or account." 11 U.S.C. § 727(a)(4)(A). For a discharge to be denied under § 727(a)(4)(A), a plaintiff must establish that "(1) the debtor made a statement under oath; (2) the statement was false; (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 case." *Republic Credit Corp. I v. Boyer (In re Boyer)*, 328 Fed. Appx. 711, 715 (2d Cir. 2009) (citations omitted). Once the plaintiff meets this burden, the burden then shifts to the debtor to provide a credible explanation for making the false and fraudulent statement or to show that it was not an intentional misrepresentation. *Gobindram v. Bank of*

India, 538 B.R. 629, 638 (E.D.N.Y. 2015) (citations omitted); *Baron v. Kklutchko (In re Klutchko)*, 338 B.R. 554, 567 (Bankr. S.D.N.Y. 2005).

The false statement under oath may have been made as part of, or omitted from, the petition, schedules, SOFA, or during examinations or the bankruptcy proceeding itself. *Gobindram v. Bank of India*, 538 B.R. at 637 (citations omitted). An omission as well as an affirmative misstatement qualifies as a false statement for purposes of § 727(a)(4)(A). *Adler v. Lisa Ng (In re Adler)*, 395 B.R. 827, 841 (E.D.N.Y. 2008 (citation omitted)). A statement or omission is material if it is "'related to the debtor's business transactions, concerns the discovery of assets, business dealings, or the existence or disposition of the debtor's property.'" *Steibel v. Bressler (In re Bressler)*, 387 B.R. 446, 461 (Bankr. S.D.N.Y. 2008) (quoting *Pereira v. Gardner (In re Gardner)*, 384 B.R. 654 (Bankr. S.D.N.Y. 2008)). It is not necessary that there be prejudice to creditors to establish materiality. *Carlucci & Legum v. Murray (In re Murray)*, 249 B.R. 223, 229 (E.D.N.Y. 2000) (citing *In re Robinson*, 506 F.2d 1184, 1188 (2d Cir. 1974)).

Proof that a statement was fraudulently made requires actual intent, not constructive intent. *Dubrowsky v. Estate of Perlbinder (In re Dubrowsky)*, 244 B.R. 560, 571 (E.D.N.Y. 2000) (citations omitted). Fraudulent intent for purposes of § 727(a)(4)(A) may be shown through circumstantial evidence, or by inference drawn from a course of conduct. *O'Connell v. DeMartino (In re DeMartino)*, 448 B.R. 122, 128 (Bankr. E.D.N.Y. 20011) (citations omitted). Intent to deceive may be found in a "reckless disregard of both the serious nature of the information sought and the necessary attention to detail and accuracy in answering." *Sanderson v. Ptasinski* (*In re Ptasinski)*, 290 B.R. 16, 23 (Bankr. W.D.N.Y. 2003) (citing *Diorio v. Kreisler-Borg Constr. Co.*, 497 F.2d 1330 (2d Cir. 1969)). The reckless indifference standard applies when a pattern of conduct evidences an obvious pattern of deceit that flies in the face of the

purpose of the Bankruptcy Code. *Dranichak v. Rosettik*, 493 B.R. 370, 379 (N.D.N.Y. 2013) (citation omitted). Numerous omissions may reveal such a pattern. *Id.*; *Castillo v. Casado (In re Casado)*, 187 B.R. 446, 450 (Bankr. E.D.N.Y. 1995) (a series of incorrect statements contained in the schedules evidences a pattern of reckless indifference equivalent to fraud); *see In re Bressler*, 387 B.R. at 462 (numerous discrepancies, falsehoods, and omissions taken together display a pattern of misleading conduct sufficient to establish a fraudulent false oath). Intent to defraud "will not be found in cases of ignorance or carelessness." *In re Gardner*, 384 B.R. at 667.

In looking at whether a debtor displayed a reckless disregard or indifference to the truth, courts consider:

> '(a) the serious nature of the information sought and the necessary attention to detail and accuracy in answering, (b) a debtor's lack of financial sophistication as evidenced by his or her professional background, and (c) whether a debtor repeatedly blamed recurrent errors on carelessness or failed to take advantage of an opportunity to clarify or correct inconsistencies.'

Abraham v. Stuart, No. 15-CV-04864 (JFB), 2016 WL 4045432, at *7 (E.D.N.Y. July 28, 2016) (quoting *Agai v. Antoniou (In re Antoniou)*, 515 B.R. 9, 24 (Bankr. E.D.N.Y. 2014)).

The first and second elements of § 727(a)(4)(A) are not in dispute. The Debtor failed to disclose assets. The Debtor's affirmative denials of having any checking, savings or other financial accounts, interests in insurance policies, interests in incorporated businesses, and income from his real estate license in his schedules are statements under oath. In addition, the Debtor's failure to disclosure his interest in the corporate account at Signature Bank containing funds belonging to the Debtor and used to pay his personal expenses, as well as the Debtor's nondisclosure on his SOFA of the entirety of his year-to-date gross income for 2014, gross income for 2013 and 2012, and transfers made from the Signature Bank account to his son's

account constitute statements under oath. The Debtor admitted these omissions at trial, and the evidence confirms that the petition, schedules, and SOFA contain false information.

Based upon the record before the court, the Trustee has proven that the Debtor knew the statements were false. The Debtor admitted that the First Niagara Account and the Signature Account should have been disclosed. The Debtor plainly knew of the existence of his corporation and the income he derived from his real estate license and other ventures. No matter how nominal he considered the income to be, it should have been disclosed on Schedule I and on the SOFA. Additionally, the Debtor was certainly aware that he earned income in 2012 and 2013 and of the wire transfers made to his son each month as he orchestrated the transfers. With respect to the life insurance policies, the Debtor testified that he thought the policies lapsed for non-payment. However, he was still paying monthly premiums via automatic withdrawal from the Signature Account post-petition, and he testified that monies deposited in the Signature Account within a year of filing could have been proceeds from a loan against the policies.

The entirety of the omissions and inaccuracies in the Debtor's Schedules B and I and the SOFA, together with the myriad of deficiencies with his filing that the Debtor failed to correct, demonstrate a reckless disregard for the truth and accuracy of those documents constituting fraudulent intent for purposes of § 727(a)(4)(A). Debtor's false oaths concerned undisclosed assets, business dealings, and possible preferential payments. Thus, the court finds that the false oaths related materially to the case.

Given that the Trustee established each of the elements of his § 727(a)(4)(A) cause of action, the burden shifts to the Debtor to provide a credible explanation for the omissions or to show that the errors were the result of honest mistakes. The Debtor openly admitted repeatedly that his bankruptcy papers contained mistakes and were incomplete. The Debtor also indicated a

number of times at trial that he filed quickly and carelessly, knowing that he could correct his mistakes. This proclamation, however, rings hollow because the Debtor did not file amended schedules or a second amended SOFA to correct the record.

The Debtor's reason for his alleged emergency filing also does not add up. The Debtor said it was because a sheriff showed up outside his office in connection with a small claims court judgment someone had obtained against him and he wanted the sheriff to go away. There was no testimony regarding the nature of the judgment, or an explanation as to how he knew the sheriff was seeking to enforce a judgment, or why the sheriff would come to his office to enforce a judgment. The Debtor also could not recall how soon after that allegedly disturbing event that he filed his petition. Based upon the Debtor's testimony, the court does not find his explanation credible.

The Debtor also asserts that he cooperated with the Trustee and turned over everything he had that was requested and, in fact, the documentation he provided revealed the assets missing from the petition. Thus, the Debtor concludes there could be no fraudulent intent on his part. The trouble with this argument is that

> the very purpose of . . . 11 U.S.C. § 727(a)(4), is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs . . . . Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight.

Boroff v. Tully (In re Tully), 818 F.2d 106, 110 (1st Cir. 1987) (citing *In re Tabibian*, 289 F.2d 793, 797 (2d Cir. 1961); *see In re Klutchko*, 338 B.R. at 568 (aim of § 727(a)(4) is to enforce debtor's obligation to provide accurate and reliable disclosure to those who have an interest in the administration of the estate). This is not a case where the Debtor realized his omissions and wished to clarify the record by supplying documents to the Trustee. It was the digging and

requests of the Chapter 7 trustee and the Plaintiff that precipitated the Debtor's production of records. The Debtor seeks to minimize his repeated and unexcused false oaths. The Debtor, however, is not your typical debtor. The Debtor holds both a Doctorate in Educational Administration and a Juris Doctorate. The Debtor operated a law firm for over 22 years. Before that he held a director position with the New York City Board of Education. Prior to being disbarred, the Debtor was a consumer bankruptcy attorney. He filed over 400 bankruptcy cases. He cannot claim ignorance or unfamiliarity with the contents of a bankruptcy petition, schedules, and statements or the procedure to amend them. "A debtor has a paramount duty to carefully consider the questions posed on the petition, schedules, and statements and to verify that all information is correct." *Ross v. Wolpe (In re Wolpe)*, Case No. 09-13469, Adv. No. 09-90130, 2013 WL 1700930, at *10 (Bankr. N.D.N.Y. Apr. 18, 2013). The Debtor did not provide a clear answer as to whether he reviewed the petition, schedules and SOFA before they were filed. If he did, the Debtor failed to give the necessary attention to detail and accuracy required to complete his petition, schedules, and SOFA. If the Debtor did not, the Debtor's false oath in signing the petition and related documents without reading them constitutes reckless indifference. *Id.*; *Gobindram v. Bank of India*, 538 B.R. at 641 (citations omitted). Based upon the Debtor's general demeanor and credibility, the court finds a reckless disregard for the truth on his part, as opposed to errors made due to honest mistakes or mere inadvertence.

The Debtor asserts his actions should be overlooked because his reckless behavior is a symptom of his bipolar disorder, and his health problems prevented him from curing the deficiencies in the petition, schedules, and SOFA. As a result of Debtor's expert report being disallowed, the only evidence in the record of the Debtor's mental disease and his alleged manic state in the summer of 2014 is his self-serving testimony. There is no corroborating evidence

that the Debtor suffers from bipolar disorder or what his mental condition was like at the time the petition was filed and in the months thereafter. Even if the court were inclined to accept the Debtor's testimony that he had been diagnosed with bipolar disease, the court is not in a position to make findings on the symptoms the Debtor was suffering from as a result of the disease or how they would negate Debtor's requisite intent without expert testimony.

The Debtor has failed to provide a credible explanation for his false oaths. Thus, the court finds that the Trustee has established by a preponderance of the evidence that the Debtor made material false oaths with fraudulent intent, and the Debtor has failed to rebut this finding. Accordingly, the Trustee's objection under § 727(a)(4)(A) is sustained.

CONCLUSION

Based upon the foregoing, the court denies the Debtor's discharge pursuant to § 727(a)(4)(A) and grants judgment in favor of the Trustee on the fourth cause of action. Because the court has denied the Debtor's discharge, it declines to rule on the Trustee's first, second, third, and fifth causes of action under § 727(a)(2)(A), (a)(2)(B), (a)(3), and (a)(5). The court shall enter a judgment consistent with this decision.

Dated: September 20, 2016

/s/ Robert E. Littlefield, Jr.
Robert E. Littlefield, Jr.
United States Bankruptcy Judge