UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:
ERIN E. FARLEY,
Debtor(s).

Case No. 14-11385
Chapter 7

GEORGIA SOKOL,
Plaintiff(s),
vs.

Adv. Pro. No. 14-90039

ERIN E. FARLEY,
Defendant(s).

APPEARANCES:

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MEMORANDUM-DECISION AND ORDER

The matter before the court is the amended complaint filed by judgment creditor Georgia Sokol ("Creditor" or "Plaintiff") requesting that the discharge of debtor Erin E. Farley ("Debtor" or "Defendant") be denied pursuant to 11 U.S.C. § 727(a)(2)(A), (a)(3), (a)(4)(A) and (B), and (a)(5).[1]

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).

[1] Plaintiff's 11 U.S.C. § 727(a)(4)(B) cause of action was withdrawn at trial. (Trial Tr. vol. 2, 40, Feb. 17, 2016.)

BACKGROUND

The Debtor filed a voluntary petition for relief under Chapter 7 on June 23, 2014. Plaintiff was listed on Schedule F as a creditor holding an unsecured claim in the amount of $79,987.48. Plaintiff commenced this adversary proceeding on October 14, 2014; an amended complaint was filed on August 31, 2015. The Plaintiff requests denial of discharge alleging multiple transgressions including omissions, false statements, and blatant attempts to hinder, delay or defraud Plaintiff's efforts to collect on a judgment by transferring or concealing assets. The Debtor's amended answer provides a general denial. A two-day trial was conducted on February 16 and 17, 2016. The Debtor and Plaintiff both testified. Upon the conclusion of the trial, the court ordered a post-trial briefing schedule. (ECF No. 90.) The briefing order was amended at the parties' request to provide additional time for submissions. (ECF No. 95.) Plaintiff's post-trial memorandum of law was filed on June 15, 2016; the Debtor, for reasons unknown, failed to comply with the court's order.[2] The briefing order provides that the Defendant's failure to file her memorandum of law shall be deemed consent to the relief sought and a waiver of any further notice or hearing.

FACTS

The court makes the following findings of fact based upon the pleadings and the evidence adduced at the trial, as well as the Joint Stipulation of Facts filed by the parties. ("Jt. Stip.," ECF No. 83.)

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[2] On September 20, 2016, the Plaintiff filed a letter with the court requesting that this matter be treated as fully submitted as the Defendant did not file her post-trial brief, and her time to do so had expired. (ECF No. 102.) No reply to the letter was filed by the Defendant.

The Plaintiff owns a multifunctional building located at 6115 Sentinel Road, Lake Placid, New York. Pursuant to a rental agreement dated April 24, 2008, she leased the restaurant portion of the structure to a company owned by the Debtor's former spouse, Robert Davis. (Pl.'s Ex. T.) The Debtor and Davis guaranteed the lease. (Pl.'s Ex. T.) The lease provides

> If the Lessee at any time shall be in default hereunder and if Lessor shall institute an action or summary proceeding against Lessee based on such default, then the Lessee shall reimburse Lessor for the expense of reasonable attorneys' fees and disbursement incurred by Lessor.

(Pl.'s Ex. A to Ex. A ¶ 22.)

Subsequent to executing their guarantees, the Debtor and Davis separated and, eventually, divorced in October 2013. (Pl.'s Ex. U.) Under the parties separation agreement dated November 1, 2009, Davis agreed to pay all liabilities associated with the restaurant and to indemnify and hold the Debtor harmless from any liability under the lease. (Pl.'s Ex. C.) There was a default in payments under the lease (Trial Tr. vol. 2, 8) leading to the commencement of an action in New York State Supreme Court by the Plaintiff on November 15, 2010, against the corporate tenant and its guarantors, Davis and the Debtor (Jt. Stip. ¶ 4). Plaintiff sought $43,006.58 plus attorney fees and costs.

The parties entered into a stipulation of settlement on March 23, 2012 (the "Settlement"). (Jt. Stip. ¶ 5.) Pursuant to the Settlement, three payments totaling $45,000 were to be paid to Plaintiff. (Pl.'s Ex. G.) The first installment of $5,000 was made by the Debtor. (Trial Tr. vol. 1, 14, Feb. 16, 2016.) The balance of the payments was not tendered. (Trial Tr. vol. 2, 15.) The Debtor testified that she believed that she would pay the first $5,000 installment and that Davis would be responsible for the balance. (Trial Tr. vol. 1, 14.) Judgment in the amount of $80,461

was ultimately entered in favor of the Plaintiff and against the state court defendants, including the Debtor, on April 18, 2014. (Jt. Stip. ¶ 3.)

On or about June 3, 2013, subsequent to the failed Settlement and prior to the judgment, the Debtor sold real property located at 5670 State Route 30, Saranac Lake, New York. The Debtor received net proceeds of $129,169.07 from the sale (Jt. Stip. ¶ 7), which she deposited into her account at Chase Bank (Trial Tr. vol. 1, 20-21). At the time of the sale, the Debtor knew that an action regarding the breach of the lease with Plaintiff had been commenced and that a settlement had been agreed to. (Trial Tr. vol. 1, 13-14.) In August 2013, $90,000 from the sale proceeds was transferred by the Debtor to the law firm of Hughes, Stewart and Race. (Jt. Stip. ¶¶ 9-10; Trial Tr. vol. 1, 21.) The Debtor requested that the proceeds be placed in an escrow account for her mother, Betty Farley a/k/a Strack. (Trial Tr. vol. 1, 23.) The Debtor considered the proceeds to be part of the Betty Strack Elder Care Fund. (Trial Tr. vol. 1, 27.) The Debtor received no security or direct financial consideration from her mother for the transfer of the sale proceeds and did not expect to be repaid. (Trial Tr. vol. 1, 115.) The Debtor intended that the money be used to renovate her mother's residence "to make things better for . . . mom." (Trial Tr. vol. 1, 28, 34.)

The Hughes law firm opened an escrow account on August 12, 2013, and initially labeled it "FILE NO. #12-485-B, ERIN FARLEY - Estate Planning." (Trial Tr. vol. 1, 27.; Pl.'s Ex. L.) On October 15, 2013, the Hughes law firm moved the balance of the escrow funds remaining to an account labeled ERIN FARLEY, Betty Strack, Elder Care, FILE NO. #13-566-B." (Pl.'s Ex. L.) The Debtor testified that she had no part in the initial ledger name or account heading, or the

changes. (Trial Tr. vol. 1, 28, 29, 34-35.)

The Debtor's mother owns real property located at 153 and 155 Parkside Drive, Lake Placid, New York (collectively, the "Parkside Properties"). (Jt. Stip. ¶ 12.) The Debtor's mother's primary residence is located at 153 Parkside; 155 Parkside is improved with a small cottage, which was completely renovated in 2010. (Trial Tr. vol. 1, 42.) The transferred funds were to be used to renovate 153 Parkside. (Trial Tr. vol. 1, 24, 34.) The Hughes law firm reviewed the contractors' invoices and their work and then paid them out of the escrow account it was holding. (Trial Tr. vol. 1, 24.) In late December 2013, after paying for maintenance, repairs, and/or upgrades to Debtor's mother's residence, as well as attorney's fees, the Hughes law firm returned the balance remaining in the escrow account, $44,221.972, to the Debtor. (Jt. Stip. ¶ 13; Trial Tr. vol. 1, 62-63.) The payment is noted on the firm's ledger as "return of balance of retainer." (Pl.'s Ex. L.) The Debtor, in turn, transferred the $44,221.97 to her adult son Josh in late December 2013, to finish the renovation of 153 Parkside. (Trial Tr. vol. 1, 63-64.) No accounting was provided by the Debtor or her son for the $44,221.97 that was transferred (Trial Tr. vol. 1, 64-72), except for the Debtor's narrative that the $44,221.97 was used for "[l]iving expenses, medical care for mother, rent, utilities, and paying contractors to finish . . . 153 Parkside." (Pl.'s Ex. N.)

When asked if she considered the money that she used for the renovations to 153 Parkside a gift to her mother, the Debtor replied

> You need to understand that mom is really sick and she has been for a long time. And as her daughter, I'm always going to do what's right and best by her. It's not about the money. It's about family and that's why I did it.
> . . . .

> . . . I get a lot in return. She raised me and she did a lot for me. It's my turn now to give back. I'm not looking for her to give me anything . . . just her love and hopefully a few more years on this planet, that's it.

(Trial Tr. vol. 1, 45.)

When asked if she put even a portion of the sale proceeds aside to pay off the debt to Plaintiff, the Debtor answered, "[a]t that time . . . Rob kept saying he was going to come up with the money." (Trial Tr. vol. 1, 101.) Later, the Debtor testified that she was "just trying my very best to do what's right by my mother. And it's about my mother and it's about my family. It's not about Georgia [Sokol]." (Trial Tr. vol. 1, 139.) The Debtor said that she gave up on the idea that Davis or his parents would somehow pay the debt to Plaintiff and make it right when the judgment was entered. (Trial Tr. vol. 1, 190-192.)

The Debtor is the sole beneficiary under her mother's will dated March 8, 1990. (Jt. Stip. ¶ 16; Pl.'s Ex. O.) The Debtor is also the attorney-in fact for her mother, having a general power of attorney dated July 9, 2009. (Jt. Stip. ¶ 17; Pl.'s Ex. P.) The Debtor's mother was diagnosed with Alzheimer's disease in 2006. (Trial Tr. vol. 1, 150.) At one point, the Debtor was living in the cottage to be near her mother. (Trial Tr. vol. 1, 104.) Then, she got someone to come in to help with her mom. (Trial Tr. vol. 1, 104.) When that did not work out, she thought if she had the renovations done at 153 Parkside to include an apartment upstairs, she or someone else could live there and take care of her mom, who would live downstairs. (Trial Tr. vol. 1, 104.) Although the Debtor did have to move her mother to an assisted living facility based upon her decline, she was hopeful the apartment idea would still work. (Trial Tr. vol. 1, 176.) After the renovations were started, her mother got worse, and it became clear the apartment idea would no

longer be an option. (Trial Tr. vol. 1, 104.) The renovations continued, and the Debtor thought she could use the rental income the house might generate to pay for her mother's care. (Trial Tr. vol. 1, 104.) However, according to the Debtor, because of deplorable conditions at the nursing home, she moved her mother to Brooklyn to live with her, Josh, and Josh's girlfriend in May 2014. (Trial Tr. vol. 1, 105.) Due to the progression of Alzheimer, the Debtor's mother is no longer competent to revise her will. (Trial Tr. vol. 1, 49, 150.)

From time to time, the cottage was rented via Airbnb. (Trial Tr. vol. 1, 175-176.) In the year prior to filing, the rental income was deposited into the Debtor's Chase Bank account. (Jt. Stip. ¶ 18.; Trial Tr. vol. 1, 53.) The Debtor used the money for living expenses. (Trial Tr. vol. 1, 169.) At some point, the Debtor began having the rental income deposited into an account controlled by her son. (Trial Tr. vol. 1, 53, 103.) The Debtor testified that she did this so that there would be a separate account for the money generated from the Parkside Properties to pay the expenses associated with the properties (Trial Tr. vol. 1, 54), however, no evidence of this account or bookkeeping for the rental income was provided. During the one-year prior to filing, the Debtor transferred thousands of dollars to her son. (Jt. Stip. ¶ 19.) Included in the money transferred to her son was a $1,300 payment for an educational class in September 2013. (Trial Tr. vol. 1, 121-122.)

The Debtor filed a voluntary Chapter 7 petition, Statement of Financial Affairs ("SOFA"), Schedules, and Declarations on June 23, 2014. (Pl.'s Ex. Q.) In addition to the Plaintiff, the Debtor lists three other creditors in her bankruptcy schedules with combined debts of approximately $700. The Debtor is employed as a kindergarten teacher at a Charter School.

(Trial Tr. vol. 1, 146.) On Schedule I ("Your Income"), the Debtor disclosed monthly gross income from wages, salary and commissions of $2,833.68 and monthly net income of $1,889.14. Under item 2 of the Debtor's SOFA, the Debtor indicates that in the two years prior to filing, she had income other than from employment or the operation of a business. In 2013 and 2014, the Debtor collected unemployment compensation in the amounts of $4,860 and $1,215, respectively. SOFA item 7, entitled "Gifts," requests a list of all gifts made within one year preceding the bankruptcy, except for ordinary and usual gifts to family members aggregating less than $200 in value per family member. The Debtor responded, "none." When asked why the transfers to improve her mother's property were not listed under "Gifts," the Debtor remained adamant that there was no gifting. (Trial Tr. vol. 1, 115.) The Debtor also replied "none" to SOFA item 10(a) labeled "Other transfers," which requires a list of all property, other than that transferred in the ordinary course of business or financial affairs of the debtor, within two years preceding the commencement of the case. When asked why sale of the Saranac Lake property was not scheduled, the Debtor responded that "I would think it would be in here somewhere. It's part of my taxes . . . it's documented. It would have to be. I would think it would be in there." (Trial Tr. vol. 1, 110.) Item 14 of the SOFA requires a debtor to list all property owned by another person that the debtor holds or controls. The Debtor responded, "none."

The Debtor filed an Amended SOFA on October 28, 2015, disclosing the sale of her Saranac Lake property on June 3, 2013 for $155,000. (Jt. Stip. ¶ 21; Pl.'s Ex. R.) In the amended SOFA, the Debtor also reveals that she is the attorney-in-fact pursuant to a general power of attorney for her mother, who resides with her. The Debtor states that her mother's

property is either in her control or in financial institutions. (Pl.'s Ex. R.)

ARGUMENTS

The Plaintiff argues that ample evidence has been produced to show that the Debtor does not deserve a discharge. Her primary focus is on § 727(a)(2)(A) and (a)(4). She states that the Debtor intentionally attempted to defraud the Plaintiff by transferring or concealing certain proceeds for the one year period prior to filing. The Debtor accomplished this by selling her real property and then investing the funds in her mother's property. As the argument goes, because the Debtor is the sole beneficiary under her mother's will, a will she is no longer competent to modify, the cloaked funds were kept out of the Plaintiff's hands and, ultimately, will return to the Debtor. Additionally, some of the proceeds were transferred to her son to help rehabilitate his grandmother's property with no records to trace what actually happened. There was also rental income generated from the Parkside Properties with no accounting to follow the proceeds. The Plaintiff's theory is that Defendant's actions reveal a classic scheme to launder sale proceeds to keep the Plaintiff's collection efforts at bay and, thus, is within the ambit of § 727(a)(2)(A).

The Plaintiff further argues that the inaccurate non-statements in the SOFA, sworn to under penalty of perjury, provided additional grounds for the denial of the Debtor's discharge.

Despite the court's briefing order, the Debtor submitted no post-trial argument or analysis.

DISCUSSION

I. Denial of a Discharge

While the Debtor failed to abide by the court's order, her failure to file a post-trial brief

does not mean that relief can be granted against her if there is no legal basis for it. *Chorches v. Dom's Cleaning & Painting, LLC (In re CC's Cleaning & Supply, Inc.)*, No. 07-30116, Adv. No. 08-3012, 2010 WL 2197430, at *4 (Bankr. D.Conn. May 26, 2010) (citations omitted). The Plaintiff still bears the burden of establishing the elements of her causes of action. A denial of discharge "imposes an extreme penalty for wrongdoing." *State Bank of India v. Chalasani (In re Chalasani)*, 92 F.3d 1300, 1310 (2d Cir. 1996). It is the "death penalty of bankruptcy." *Levine v Raymonda (In re Raymonda)*, No. 99-13523, Adv. No. 99-91199, slip op. at 4 (Bankr. N.D.N.Y. Feb. 9, 2001). As a result, the provisions of § 727 are construed strictly against the objecting party and liberally in favor of the debtor. *In re Chalasani*, 92 F.3d at 1310. It is well-settled that the party objecting to the granting of a discharge bears the burden of persuasion by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 289, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

II. Denial of a Discharge under § 727(a)(2)(A)

Section 727(a)(2)(A) is intended to prevent the discharge of a debtor who attempts to avoid payment to creditors by concealing or otherwise disposing of assets. 6 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 727.02 [1], at 727-13 (16th ed. 2016). The Plaintiff must establish that "(1) the debtor transferred, removed, . . . or concealed (2) . . . her property . . . (3) within one year of the petition filing date . . . (4) with intent to hinder, delay or defraud a creditor." *Brundege v. Brundege (In re Brundege)*, 359 B.R. 22, 30 (Bankr. N.D.N.Y. 2007) (citing *In re Watman*, 458 F.3d 26, 32 (1st Cir. 2006)). The Plaintiff has established the first three elements. The Debtor transferred proceeds from the sale of her Saranac Lake property first to the

Hughes law firm to be placed in an account for her mother. Then the remnants of the money were given to her son. Both transfers occurred within one year of the petition date. The only remaining issue is whether the Debtor had the intent to hinder, delay or defraud the Plaintiff at the time of the transfers.

Actual intent, as opposed to constructive intent, must exist. *In re Watman*, 458 F.3d at 34 (citations omitted). Since fraudulent intent is rarely susceptible to direct proof, courts have developed "badges of fraud" to establish the requisite actual intent to defraud. *In re Kaiser*, 722 F.2d 1574, 1582 (2d Cir. 1983). The badges of fraud often cited as circumstantial evidence include: (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, (6) onset of financial difficulties, or pendency or threat of suits by creditors; and (7) the general chronology of the events and transactions under inquiry. *In re Kaiser*, 722 F.2d at 1582-83. Additionally, some courts have stated that a presumption of actual fraudulent intent arises when property is either transferred gratuitously, or is conveyed to relatives. *Abbott Bank-Hemingford v. Armstrong (In re Armstrong*), 931 F.2d 1233, 1239 (8th Cir. 1991); *Pavy v. Chastant (In re Chastant)*, 873 F.2d 89, 91 (5th Cir. 1989) (citation omitted); *Najjar v. Kablaoui (In re Kablaoui)*, 196 B.R. 705, 710 (Bankr. S.D.N.Y. 1996). This presumption establishes a plaintiff's prima facie case, and it is then up to the debtor to refute the inference of fraudulent intent.

In this case, there is no dispute that Plaintiff has established transfers to family members for insufficient consideration. Although Plaintiff's prima facie case as to the fourth element is established, the court finds evidence of several additional badges of fraud to support an inference of fraud. The transfers of the sale proceeds were not disclosed in the Debtor's SOFA. Nor was the rental income the Debtor collected from Airbnb revealed anywhere in the Debtor's schedules or SOFA. The Debtor has a general power of attorney from her mother and, thus, retains the ownership benefits of the renovated real estate in question, both in terms of use, occupancy, and rental income accruing from the site. There is no dispute that the Debtor knew of the obligation to the Plaintiff under the Settlement when the transfers were made. Additionally, the 2013 sale of the Debtor's Saranac Lake property exhausted any significant hard assets the Plaintiff could look to for payment.

More importantly, the circuitous route the money took to, in effect, be given away, is troubling. After the closing, the sale proceeds went from the Debtor's account to the law firm. The Debtor testified that she wanted the money to go into an escrow account set up for her mother. However, the Hughes law firm placed the funds in a trust account for the Debtor. Next the law firm transferred the funds to an account for both the Debtor and her mother. Approximately 50% of the proceeds was consumed by the firm's overseeing of the renovation project. There was no explanation given as to why the law firm was acting as the general contractor for the renovation project. The balance of the funds went to the Debtor's son to allegedly finish the project. However, with no accounting or testimony from the Debtor's son, it is impossible to discern what, if anything, was done with the $44,221.97 he received. Some or all

of the money transferred may have simply remained with the son. There is nothing in the record to demonstrate that these transfers were in the nature of charity or familial support. Nor is there any tax, estate, financial or other reasoning offered for the unusual course of financial dealings. The unorthodox machinations, together with the SOFA nondisclosures, suggest something more than mere construction, repair and assistance was involved. If the Debtor simply wanted to renovate her mother's property, it could have been accomplished in a more direct fashion.

Also problematic is what Betty Strack actually received. The bulk of the Debtor's case is the rebuilding of 153 Parkside to help her mother. It would appear that result never occurred. The Saranac Lake property was sold in June 2013; the partial proceeds were transferred to the law firm in August 2013. The last construction invoice paid by the firm was December 30, 2013. Without any records from her son, it is unclear what, if anything, he did and when. Thus, it would appear that the renovation project was not finished until the first quarter of 2014 at the earliest. The Debtor's mother was a resident at an assisted living facility after the Debtor sold her property in June 2013, and the Debtor removed her from a nursing home to live with her in Brooklyn in May 2014. If Betty Strack had vacated her house prior to the renovations beginning, it is difficult to accept the rationale that the transfers and rapid depletion of the Debtor's funds were justified by an otherwise laudable goal. In this case, the end did not justify the means.

As there has been a sufficient showing of the presence of badges of fraud to raise a presumption that the Debtor's actions were done with fraudulent intent, it is up to the Debtor to demonstrate that she lacked fraudulent intent. A debtor may rebut that presumption by offering evidence sufficient to demonstrate the absence of fraudulent motive for his or her actions. *Pisculli*

v. T.S. Haulers, Inc. (In re Prisculli), 426 B.R. 52, 67 (Bankr. E.D.N.Y. 2010) (citations omitted).

Inexplicably, the Debtor provided no post-trial brief or analysis to rebut the presumption. Courts have held that a party's failure to address a claim or defense in its post-trial submission constitutes a waiver of those issues. *Strong v. Option One Mortg. Corp.* (*In re Strong)*, 356 B.R. 121, 136-37 (Bankr. E.D. Pa. 2004) (citing cases); *see ProBatter Sports, LLC v. Sports Tutor, Inc.*, 172 F.Supp.3d 579, 588 (D.Conn. 2016) (citing *Bendix Corp. v. United States*, 600 F.2d 1364, 1368-69 (Ct. Cl. 1979) (holding that defendant abandoned its earlier asserted defenses because it did not address them in its post-trial brief)). Even if the court finds there was no waiver by the Debtor of her rebuttal, the Debtor's testimony simply gives no rational basis for her actions that would counterbalance Plaintiff's argument of deceit as shown by the multiple badges of fraud.

Debtor's counsel did not rehabilitate the damaging testimony on cross examination or later on his direct of the Debtor. The Debtor's mantra that the funds simply did not belong to her is unconvincing. The proceeds emanated from the sale of the Debtor's real property. It was her money unless it was donated to her relatives. However, the Debtor states her actions did not constitute a gift. Her theme is one of family first; she stated that all her actions were simply done to help them. Generally, a debtor does not receive reasonably equivalent value when a transfer is made out of a sense of a moral, rather than a legal, obligation. *In re Lang*, 246 B.R. 463, 469 (Bankr. D.Mass. 2000) (citing cases). Nor does a debtor's belief that his or her conduct is morally justifiable meet the debtor's burden of proof that the act was not within the scope of § 727(a)(2). *Gebhardt v. McKeever (In re McKeever)*, 550 BR. 623, 640 (Bankr. N.D. Ga. 2016) (citing *Haag*

v. Nw. Bank (In re Haag), No. 10-01207, Adv. Nos. 10-01207 & 10-01268, 2012 WL 4465353, at *6 (9th Cir. BAP Sept. 27, 2012), *aff'd*, 584 Fed. Appx. 620 (9th Cir. 2014). Also problematic is that the Debtor helped herself while frustrating the Plaintiff. Initially, in insulating the proceeds from any preemptive creditor strike by investing in her mother's property and/or giving money to her son. Then, secondarily, placing the money in a venture that, in all likelihood, would return some or all of it to her in the future. As Debtor has failed to present sufficient evidence to rebut the presumption of fraudulent intent, Plaintiff's objection to Debtor's discharge under § 727(a)(2)(A) is sustained.

III. Attorney's Fees

Although not plead in the amended complaint, the Plaintiff requested reasonable attorney's fees in her closing argument and in her post-trial brief. Under the "American Rule" each side bears the expense of its attorney's fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Deviation from the rule requires either a statutory basis or an enforceable contract between the parties. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967). The Plaintiff concedes that § 727 does not provide a statutory basis for the recovery of fees. Instead, she cites to her lease agreement, which the Debtor guaranteed, as a contractual basis for an award. The attorney's fees provision in the lease allows for an award associated with an action or proceeding on the lease. The adversary proceeding was not based on the tenant's default under the lease and Debtor's guaranty. That proceeding occurred pre-petition and resulted in the April 18, 2014 state court judgment which included attorney's fees, presumably pursuant to the lease. A creditor

cannot use an attorney's fee clause in a contract with the debtor to recover attorney's fees in an action under § 727 because it is not an action on its contract. *Tuloil, Inc. v. Shahid (In re Shahid)*, 254 B.R. 40, 44 (10th Cir. BAP 2000). Relief under § 727 benefits all creditors. The creditor that litigates a § 727 action does not gain any special advantage. A denial of a discharge places every creditor in the position of being able to pursue collection of its debt. The cases relied upon by the Plaintiff are distinguishable. *TranSouth Fin. Corp. of Fla. v. Johnson*, 931 F.2d 1505 (11th Cir. 1991) and *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163 (6th Cir. 1985), involved attorney's fees awarded in nondischargeability actions brought under § 523. In *Joseph F. Sanson Inv. Co. v. 268 Ltd. (In re 268 Ltd.)*, 789 F.2d 674 (9th Cir. 1986), a secured creditor sought attorney's fees pursuant to § 506. Based upon the record before it, the court sees no reason to stray from the American Rule that each litigant pay its own attorney's fees.

CONCLUSION

Based upon all of the foregoing, the Court denies Debtor's discharge pursuant to § 727(a)(2)(A). Because the Court has denied the Debtor's discharge, it does not reach the Plaintiff's remaining causes of action plead under other subsections of § 727(a). Each party shall bear their own attorney's fees. A separate judgment will be entered in accordance with Federal Rule of Bankruptcy Procedure 7058.

It is SO ORDERED.

Albany, New York
February 24, 2017

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