UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

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In re

PAUL S. HUDSON — Case No. 00-11683
Chapter 7

Debtor

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WASHINGTON 1993, INC.

Plaintiff

-against- — Adversary No. 00-90091

PAUL S. HUDSON

Defendant

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APPEARANCES:

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

**MEMORANDUM-DECISION AND ORDER**

The matters before the court involve objections to the dischargeability of debts pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), (a)(4) and (a)(6) and an objection to discharge pursuant to 11 U.S.C. § 727(a)(4). The court has jurisdiction over these core matters pursuant to 28 U.S.C. § 157(a), (b)(1),

(b)(2)(I), (b)(2)(J) and § 1334(b).

The court holds the Debtor is not entitled to a discharge. Findings of fact and conclusions of law relevant to that determination follow:

Facts[1]

The Debtor filed a Chapter 7 petition in the United States Bankruptcy Court for the District of Maryland ("Maryland bankruptcy court") on November 12, 1999. According to his own testimony, he filed primarily because of pending New York state court litigation brought by Richard Corvetti and Washington 1993, Inc. (sometimes referred herein as "Plaintiff") involving an alleged fraudulent conveyance under New York law ("fraudulent conveyance lawsuit"). Two other lawsuits Mr. Corvetti had brought against him or his businesses were also pending when he filed. (Tr. Day 4 p. 214.) Although some of the evidence in the record indicates a trial involving the fraudulent conveyance lawsuit was scheduled for the Monday following his filing (i.e., Tr. Day 4 pp. 214-216; Day 6 pp. 120, 128, 146), other documents indicate the fraudulent conveyance lawsuit's trial date was not until April 2000 and it was the two lawsuits involving the business contracts that were scheduled (e.g., Affidavit in Support of Motion for Summary Judgment ¶¶ 19-20). In any event, if the Debtor not filed he would have had to defend at least one state court "Monday trial."

The Debtor is no stranger to this bankruptcy court having filed a Chapter 11 petition for a business entity he owned and operated (i.e., Kent and Haroldsen Associates, Inc., Case No. 95-10607 ("K&H")), a Chapter 7 petition for another such business entity (i.e., Equity Homes of Albany, Case

[1]To the extent the facts recited in this part of the decision were not taken from documents entered into evidence or from testimony received during the eight-day trial, the court has taken judicial notice of the contents of many other documents. Those documents include ones filed in each of the individual bankruptcy cases the Debtor has filed. Judicial notice has also been taken of the dockets of those cases and of the dischargeability adversary proceeding filed by Richard Corvetti in the Debtor's prior Chapter 11 case.

No. 99-16518 ("Equity")) and an individual Chapter 11 petition (Case No. 95-10609) on prior occasions. He filed both Chapter 11 cases in February 1995; K&H's case eventually converted to Chapter 7. His prior individual case was dismissed in April 1997. Just prior to the dismissal, the 1104 Trustee duly appointed in his case had filed a motion to convert it to a Chapter 7 primarily on the grounds of the Debtor's failure to schedule an asset. According to the 1104 Trustee, the Debtor had failed to schedule a wrongful death lawsuit pending in Ohio against Pan Am Airlines concerning the death of his daughter Melina during the plane explosion that occurred over Locherbie, Scotland in December 1988.

When the 1104 Trustee filed his conversion motion in the Debtor's prior Chapter 11 case, the remainder of a trial involving the dischargeability of certain debts was pending in an adversary proceeding Mr. Corvetti had brought. Rather than completing the dischargeability trial or granting the 1104 Trustee's conversion motion, the court, sua sponte, dismissed the case. The dismissal allowed Mr. Corvetti and the Debtor to pursue whatever causes of action they might have had against each other in an appropriate state court forum. After the dismissal, Mr. Corvetti and Washington 1993, Inc. pursued state court litigation against the Debtor, right up until the day he filed his Chapter 7 petition in the Maryland bankruptcy court.

The Maryland bankruptcy court granted the Debtor's motion to extend the time to file his Statement of Financial Affairs and schedules and ordered him to file them on or before December 10, 1999. He filed them on December 9, 1999. Neither the original Statement of Financial Affairs nor any of the original schedules mentioned any of the lawsuits Mr. Corvetti or Washington 1993, Inc. had pending against the Debtor when he filed. In response to Question 20 on his Schedule B - Personal Property, he listed a nondescript counterclaim against Mr. Corvetti in an "UNKNOWN" amount. He also listed a lawsuit against the Government of Libya with the same "UNKNOWN" amount. On his

Schedule H – Codebtors, he listed Mr. Corvetti and Washington 1993 twice as creditors of K&H. He included both parties on the List of Creditors he filed with the petition; he listed both with a $300,000 claim and a disputed, contingent, unliquidated claim in the amount of $500,000. In response to Question 2 on his Statement of Financial Affairs, he indicated that in 1997 he received $67,600 of $112,600 as his share of a wrongful death lawsuit. Although he noted it as "M. Hudson vs. Pan Am, et al," he did not state where the lawsuit had been filed nor did he mention what the other parties to that lawsuit received. What would otherwise have been $45,000 of the $112,600 remaining, he noted as "$47,000 - distribution from trust."

On January 12, 2000, Mr. Corvetti filed several motions in the Maryland bankruptcy court, including a motion for change of venue and three motions seeking relief from the automatic stay. Paragraph 21(d) of the venue motion contained a specific allegation regarding the Debtor's failure to disclose settlement proceeds the Debtor was allegedly entitled to in the Ohio wrongful death lawsuit but which he allegedly conveyed to his sons. In a rather factually specific but not always historically accurate[2] response filed on January 24th, Debtor's former counsel specifically addressed the allegations contained in that paragraph, arguing the New York intestate distribution law had no application in the federal wrongful death case. At paragraph 18(c) of the response, former counsel indicated the caption of Mr. Corvetti's fraudulent conveyance lawsuit (i.e., NYS Sup. Ct. Alb. Co., Index No. 3920-98), but the Debtor did not amend his Statement of Financial Affairs to include that pending lawsuit.

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[2]E.g., in paragraph 24 counsel states "[the Debtor's] Chapter 11 case was dismissed, without prejudice, upon the trustee's motion, and upon the consent of the Debtor." (Debtor's Opposition to Motion for Change of Venue p. 8.) As discussed below, this court dismissed his prior Chapter 11 case, **sua sponte**. Although the 1104 Trustee had a motion to convert pending, no trustee motion to dismiss played a role in the court's decision.

The Chapter 7 trustee initially assigned to the Debtor's case filed a response supporting Mr. Corvetti's venue motion. Interestingly, she believed the Debtor filed his case in the Maryland bankruptcy court solely "to gain a tactical advantage by making it extremely difficult for [his] creditors, the parties who have a real interest, to participate in the bankruptcy process, and pending litigation." (Chapter 7 Trustee's Response in Support of Richard T. Corvetti's Motion for Change of Venue ¶ 9.)

Mr. Corvetti served each of his three stay relief motions on Debtor's former counsel and sent each notice of motion to the Debtor's law office in New York. In the first and third motions for stay relief (i.e., Doc. # 14 and Doc. # 18 according to the court docket), Mr. Corvetti specifically referenced the Debtor's failure to schedule his alleged conveyance to his sons of the Ohio wrongful death lawsuit settlement proceeds. Although Debtor's former counsel filed opposition to both of those motions, he specifically addressed the fraudulent conveyance allegation in only one of his two responses. In Document # 26, counsel likened the third stay relief motion to a motion to compel abandonment, arguing that the relief sought (i.e., pursuit of a fraudulent conveyance action) belonged to the Trustee to administer, not the movant. Yet again, the Debtor did not amend his Statement of Financial Affairs.

On February 10, 2000, Washington 1993, Inc. commenced an adversary proceeding against the Debtor, challenging his discharge and the dischargeability of certain debts ("instant adversary proceeding"). The complaint contained seven paragraphs regarding the § 727(a)(4) cause of action, the main allegation being the Debtor did not schedule the $102,902.76 and $37,000 transfers to his sons as assets/revocable transfers on his petition. Specifically, at paragraph 42, Washington 1993, Inc. described the Debtor's transfers to his sons as "subject to being set aside under the law of Ohio or New York" and, at the first paragraph numbered 43, it stated "Debtor has not scheduled these revocable transfers as assets." It also alleged at the second paragraph numbered 43 and at paragraph 44 that the

Debtor's wrongful death lawsuit against the government of Libya was worth more than the zero value the Debtor scheduled.

It was not until March 14, 2000, more than a month after the instant adversary proceeding was filed and served, over two months from the filing and service of the venue motion and over four months from the petition date, that the Debtor filed his Second Amended Statement of Financial Affairs.[3] In that statement he listed the lawsuits involving the Debtor and Richard Corvetti or Washington 1993, Inc., including the fraudulent conveyance action, that were pending when he filed. The content of the amended document as compared to the original is discussed more thoroughly below.

Ultimately, the Maryland bankruptcy court granted Mr. Corvetti's venue motion and denied, without prejudice, the three lift stay motions. That court transmitted the Chapter 7 case and the instant adversary proceeding here. Shortly after the court received the case and the adversary proceeding, Mr. Corvetti filed three motions for relief from stay, one requesting release to the trustee of $545 held by the Albany County Clerk, one requesting permission to pursue the fraudulent conveyance lawsuit in state court and one requesting pursuit of another lawsuit pending against the Debtor in order to allow him access to a single trier of fact with regard to the actions of the Debtor, Equity and another debtor in this court, Michael Reles, and to secure findings of fact relative to the instant adversary proceeding. The court considered the overlap between the state court lawsuits and the instant adversary proceeding. Having decided that a bankruptcy court was better suited to hear all of the allegations to the extent they involved discharge and dischargeability determinations, the court denied the two lift stay motions involving the state court lawsuits.

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[3]The Maryland bankruptcy court's docket does not show that a "First Amended" Statement of Financial Affairs, or anything similar, was ever filed.

After the Debtor filed his answer, including an affirmative defense which alleged the Plaintiff was not a proper party because it was a dissolved corporation, the court issued a standard scheduling order in the adversary proceeding and conducted two pretrial conferences, one regarding the discovery deadline and the date initially set for trial and the other regarding a discovery matter. On September 14, 2000, the extended date agreed to by the parties, the court heard the Plaintiff's motion for partial summary judgment seeking a denial of discharge pursuant to § 727(a)(4). In the affidavit accompanying the motion, Plaintiff's counsel alleged specific facts regarding the Debtor's failure to list any pending litigation he had involving either the Plaintiff or Mr. Corvetti in the answer he gave to Question 4 on his original Statement of Financial Affairs. Plaintiff's counsel filed both a memorandum of law and a reply brief.

In his opposition to the § 727(a)(4) summary judgment motion, Debtor counsel pointed out that the § 727(a)(4) cause of action stated in the complaint did not allege a failure to list lawsuits on the Statement of Financial Affairs. He argued that because the complaint did not allege that particular failure, the Debtor lacked notice and § 727(a)(4) relief could not be granted on the new grounds. (Response to Motion for Partial Summary Judgement [sic] Made by Plaintiff Under Cause of Action 5 of the Complaint For [sic] Under 11 U.S.C. 727(a)(4)("Response to S/J Motion") ¶ 9.) He also alleged that any failure to list the lawsuits was a clerical error; he attached an affidavit from his former counsel that offered an explanation about what happened. He did not state what prejudice, if any, would exist if the court allowed the Plaintiff to pursue this "not pled" cause of action nor did he request summary judgment for himself.

In the affidavit attached to the Debtor's response to the § 727(a)(4) summary judgment motion, former counsel explained that the lawsuits involving Mr. Corvetti and Washington 1993, Inc. were not listed on the original Statement of Financial Affairs because the list the Debtor provided to him in

response to Question 4 of the client questionnaire did not match a list of pending lawsuits he had received from the Debtor on a prior occasion. (Response to S/J Motion, Ex. 2.) This explanation was essentially the same one he offered at trial; it is discussed in detail below.

In a reply affidavit, Plaintiff's counsel, addressing the alleged failure to plead "missing lawsuits" as further grounds for a denial of discharge under § 727(a)(4), asserted the Plaintiff specifically pled in paragraph 41 that the Debtor's schedules were false and in paragraph 42 referenced the transfers the Debtor made that were subject to being set aside. He characterized the Debtor's "no notice of the new grounds" argument as a red herring and his "clerical failure" defense as nothing more than an insufficient "law office failure" that should not defeat the summary judgment motion.

At the summary judgment hearing, the court listened to the parties' oral argument, including Debtor's counsel position that the failure to include the fraudulent conveyance lawsuit would not have materially impacted the estate because the Plaintiff had failed to obtain personal jurisdiction over the Debtor's sons as transferees. It found questions of fact existed and informed both parties that it wanted to hear the Debtor's explanation regarding his failure to list the lawsuits the Plaintiff and Mr. Corvetti had pending against him when he filed. Additionally, despite his counsel's oral argument, the court did not grant summary judgment to the Debtor. The court directed Debtor's counsel to prepare an order denying Plaintiff's motion, an order he never submitted.

On October 23, 2000, the first day of trial in the instant adversary proceeding, the Debtor filed a motion in limine, objecting to any amendment that included additional § 727(a)(4) causes of action. Specifically, he argued the Plaintiff's intent in introducing documents from his former Chapter 11 case and calling key participants in that case was "to expand [section 727(a)(4)] to include acts related to a previous case." (Motion in Limine to Object to Expansion of Case to Matters Not Plead [sic] in Complaint ("Motion in Limine") ¶¶ 4-5.) He further argued that he would be substantially prejudiced

because he could have presented documents and witnesses regarding the prior case had he known of Plaintiff's intent to expand section 727(a)(4) language of "the Bankruptcy case" to a previous case. (Motion in Limine ¶¶ 5, 7.)

On October 30, 2000, after hearing what the Plaintiff and the court had to say regarding the motion in limine and the argument against granting it, the Debtor withdrew his motion, subject to the restricted use of evidence regarding the Debtor's prior bankruptcy case. (Tr. Day 6 pp. 44-46.) The record indicates any evidence regarding the Debtor's prior case was admitted for Fed. R. Evid. 404(b) purposes only. (Tr. Day 6 pp. 45-46.)

At trial, the Debtor's former bankruptcy counsel, James Greenan, Esq., testified about the circumstances surrounding the Debtor's filing of his barebones Chapter 7 petition in Maryland and about the preparation of his statements and schedules that occurred after the filing. He said his usual practice involving emergency filings includes obtaining a list of the would-be debtor's unsecured creditors and any information vital to completing the "petition page." (Tr. Day 6 pp. 122, 144-145.) After such a filing occurrs, his firm would ask the debtor to complete a questionnaire, including information a debtor must disclose in schedules and statements required in a Chapter 7 case. (Tr. Day 6 pp. 129-130.)

As for the particulars of the Debtor's case, former counsel informed the court that the Debtor and his current bankruptcy counsel, Richard Croak, Esq., telephoned him on a Wednesday or Thursday and stated that "a trial on Monday[4]" was scheduled. (Tr. Day 6 p. 120.) He also testified that the

[4]According to the Debtor's testimony, the Monday trial was regarding Mr. Corvetti's fraudulent conveyance lawsuit. (Tr. Day 4 pp. 214-216.) The complaint, however, alleges it was a lawsuit brought by Mr. Corvetti and Washington 1993, Inc. against the Debtor, Michael Reles and Equity, involving alleged fraudulent representations made by them regarding 178-180 Washington. (Complaint ¶¶ 19-20.) The Debtor's affidavit filed in response to the Plaintiff's motion for summary judgment indicates Monday's trial involved the setting alleged in the

Debtor gave his firm a list of creditors for the barebone petition; that, at the same time, the Debtor also faxed an unsolicited list of pending lawsuits the firm never used but did place in his file; that the firm prepared and filed a barebone petition; that the Debtor completed the questionnaire his firm sent; that on the questionnaire the Debtor did not list several lawsuits, including the "Monday trial"; and that despite an opportunity to review the schedules and the statements both before and after filing, the Statement of Financial Affairs was not amended until approximately four months after the Debtor filed his barebone petition. (Tr. Day 6 pp. 121, 123, 128-133, 135-136, 139, 143, 145-148.) The Debtor himself testified that he filed because of the Monday trial and that he reviewed the schedules and statements for approximately one and a half hours before they were filed. (Tr. Day 4 pp. 215-216; Day 6 pp. 177-178.)

Exhibit XX is the document marked as the November 11, 1999 fax; it is a document containing seven pages. On the first five pages, the Debtor listed his major creditors. This five-page document's pages have facsimile markings of pages 1 through 5 and have a 5:13 p.m. or a 5:14 p.m. time marked at the top of each page. (Ex. XX.) The remaining two pages are marked pages one and two. This two-page document contains captions of litigation pending against the Debtor as of November 11, 1999. Each page has a 5:17 p.m. time marked at the top of each page. According to Mr. Greenan's testimony, it is page one of the two-page document that was "missing" from the list of lawsuits used to answer Question 4(a) on the questionnaire sent by his law firm and filled out by the Debtor after he filed his barebone petition. (Tr. Day 6 p. 134.)

Next to Question 4(a) on the questionnaire sent by Mr. Greenan's law firm, the Debtor wrote "See attached" and attached a list of lawsuits. (Ex. 136.) He did not merely attach the page 2 referred

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complaint. (See Affidavit of Paul Hudson ¶ iii.)

to above. The attachment Mr. Hudson prepared as an answer to Question 4(a) includes far more lawsuits than initially contained on page 2; it even contained one of the lawsuits[5] listed on page 1 for some unexplained reason. The attachment did not, however, list the property tax certiorari proceeding involving the Albany Board of Assessment & Review which was listed on page 2 of the faxed document. Also, the Question 4(a) attachment only listed one of two Fleet Bank lawsuits listed on page 2. Furthermore, it did not list lawsuits in the same order and typeface used on page 2 of the faxed document.

As for the Debtor's "Second Amended" Statement of Financial Affairs, it did not merely add all of the lawsuits listed on page 1, the so-called "missing page." As described above, one of the missing page lawsuits did make it onto the attachment to the questionnaire and thus onto the original Statement of Financial Affairs. The amended statement did not include the lawsuit involving Equity, a lawsuit the Debtor had listed on the missing page. Also, the amended statement includes a lawsuit between the Debtor and his father, William B. Hudson. That lawsuit was not one of the ones the Debtor had listed on the missing page.

Debtor's counsel involved in the Ohio wrongful death lawsuit, Nicholas Gilman, Esq., testified, inter alia, about the Debtor's lawsuit against Libya that was pending when he filed. During examination by the court, he explained his belief that any compensatory damages plaintiffs had already received from litigation stemming from the Locherbie disaster would be used as a set off against any recovery allowed against the Libyan government. (Tr. Day 7 pp. 49-50.) As for any other potential recovery, he testified, "under the Foreign Sovereign Immunities Act there are certain aspects of

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[5]A 1995 Houston, Texas lawsuit involving AmSouth Bank, K&H and the Debtor is listed as the first lawsuit on the "missing page" of the November 11, 1999 fax; it is also listed as the seventh lawsuit on the Question 4(a) attachment.

punitive damages that can be pursued and...that's where, if anything, there is going to be some type of recovery." (Tr. Day 7 p. 50, lines 8-12.) When questioned about his familiarity with the Debtor, Mr. Gilman responded that he knew him "very well" and that they spoke on "numerous occasions" regarding the Ohio wrongful death lawsuit. (Tr. Day 7 p. 4, line 13; p. 17, line 15.) There was no testimony elicited about his contact with the Debtor regarding the lawsuit against Libya.

On Day 5 of the trial, the court rendered an oral decision[6] dismissing Washington 1993, Inc.'s dischargeability action under 11 U.S.C. § 523(a)(6) with respect to the alleged destruction of the apartment building by the Debtor and/or K&H employees. On Day 6, the court made a further dismissal determination[7] regarding the 523(a)(6) cause of action, specifically, its application to the alleged missing rents. At trial, the court indicated the appeal time pursuant to Fed. R. Bankr. P. 8002(a) regarding both 523(a)(6) determinations would not begin to run until the date of this written decision.

After the trial concluded, the court ordered the parties to submit post-trial briefs according to dates acceptable to both parties. Those dates were adjourned several times due to transcription error and requests for additional time.

Argument

Washington 1993, Inc. bases its discharge objection largely on the Debtor's behavior regarding his share of the proceeds of a wrongful death lawsuit arising from the death of his daughter, contending that the Debtor has concealed this material asset from his creditors since early 1994. It

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[6]The transcript contains many typographical errors regarding the oral decisions the court read into the record on Day 5 and Day 6 of the trial. Because these errors only mildly detract from the court's determinations, it has decided, in the interests of economy, not to require the issuance of new transcripts.

[7]Tr. Day 6 pp. 113-118.

asserts it has the burden to show, by a preponderance of the evidence, that the Debtor made a statement under oath that was false; that he knew or should have known that the statement was false; that he made the statement with fraudulent intent or recklessly; and that the statement related materially to his bankruptcy case. (Plaintiff's Post Trial Brief p. 2.) It contends it has met its burden and relies on several bankruptcy cases as support for its position.

Plaintiff's legal argument is very similar to the one it made in its summary judgment briefs. Now, with the benefit of the testimony the Debtor and his former bankruptcy counsel offered at trial, it argues the Debtor clearly knew about the fraudulent conveyance lawsuit when he filed and intentionally left it off of his Statement of Financial Affairs. Citing cases where courts have allowed plaintiffs to prove fraudulent intent by circumstantial evidence including reckless disregard for the truth, it contends that by hiding the fraudulent conveyance lawsuit, the mechanism the Plaintiff had been pursuing to recover a transfer of his legal entitlement to a recovery due to his daughter's wrongful death, the Debtor continues his pattern of hiding the Ohio wrongful death lawsuit from his creditors. It asserts the failure to list the fraudulent conveyance lawsuit was not a simple mistake as the Debtor offered. After laying out the testimony of Mr. Greenan and the Debtor regarding the circumstances surrounding the filing, especially the Debtor's admission of intending to stop the Monday litigation, and the preparation of his schedules and statements, it proposes the record supports a finding that the Debtor "embarked upon a cleverly calculated scheme to prevent the Maryland Bankruptcy Court, the Maryland trustee, who would have no knowledge of his prior actions in the Albany Bankruptcy proceeding, and his creditors from learning of the circumstances surrounding the distribution of the wrongful death proceeds and the challenge to that distribution mounted by Mr. Corvetti." (Plaintiff's Post Trial Brief p. 22.)

While both the Plaintiff's and the Debtor's briefs contain several incomplete citations, the

Debtor's "corrected" post-trial brief contains numerous grammatical errors, including incomplete sentences. As best as the court can reconstruct, the Debtor's argument appears to be as follows:

Similar to his opposition to the Plaintiff's motion for partial summary judgment, the Debtor begins his legal argument by repeating that Washington 1993, Inc. has raised a new § 727(a)(4) cause of action. Once again, he argues that difference violates the specificity requirement of Fed. R. Civ. P. 9(b). Stating the complaint "is inadequate" in that it did not allege the facts the Plaintiff sought to prove at trial and asserting the bankruptcy court must strictly construe objections to discharge, the Debtor maintains he was not informed of the claim being made against him and is entitled to a discharge. (Debtor's Post Trial Brief (corrected copy) p. 9.) He cites several Second Circuit cases as support for his contention that "any objection to discharge falls within the federal rules' definition of a fraud complaint requiring a greater degree of specificity." (Debtor's Post Trial Brief (corrected copy) p. 9.)

Citing *Grogan v. Garner*, 498 U.S. 279 (1991), the Debtor asserts the Plaintiff has not met its burden of production and persuasion regarding its § 727 objection to discharge. Believing the circumstances surrounding the Chapter 7 filing are devoid of any attempt by him to hide or conceal any litigation that was pending when he filed, the Debtor suggests that Washington 1993, Inc., forced to look elsewhere for circumstantial evidence of intent, can only show it by going well beyond the immediate past. He relies on *In re Barrett*, 105 B.R. 385(Bankr. N.D. Ohio 1989), *aff'd*, 964 F.2d 588 (6th Cir. 1992), as authority for the proposition that the circumstances of a prior filing are not relevant on the issue of bad faith.

As for the affirmative defense he raises in his answer, the Debtor's post trial brief contains only one reference to the Plaintiff's corporate existence. In a footnote, he merely states that Washington 1993, Inc. is a dissolved entity used by Mr. Corvetti simply as a vehicle for continuing litigation

against him. (Debtor's Post Trial Brief (corrected copy) p. 1.) He provides no legal analysis or argument regarding why the Plaintiff corporation, dissolved or not, cannot continue to marshal its assets for the benefit of its creditors and shareholders.

In its reply brief, Washington 1993, Inc. reiterates the proof in the record is sufficient to support a denial of the Debtor's discharge. Regarding the Debtor's argument that the "new" § 727(a)(4) cause of action should be dismissed because of the requirement under Fed. R. Civ. P. 9 to plead fraud with particularity, the Plaintiff asserts its pretrial motion for partial summary judgment put the Debtor on notice well before the October trial. Without agreeing that its complaint lacked the specificity required by the federal rules, it requests that the court allow it to amend its pleadings to conform to the proof. Citing *Browning Debenture Holders Comm. v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977), Washington 1993, Inc. argues it has met the test of whether the new issues were tried by the parties by express or implied consent; it also argues the Debtor was not prejudiced by any amendment.

Discussion

I. Fed. R. Civ. P. 15

The court has already found that Debtor's counsel withdrew his motion in limine seeking to preclude the Plaintiff from amending its complaint. (Facts pp. 7-8.) In the interest of completion, and, perhaps, providing guidance to the local bankruptcy bar in general, the court will address the Debtor's legal argument that the Plaintiff's allegation that the missing lawsuits on the original Statement of Financial Affairs constitutes a new factual basis for a § 727(a)(4) cause of action and should be denied for failure to timely commence it.

A. Fed. R. Civ. P. 15(b)

Fed. R. Civ. P. 15, made applicable in adversary proceedings pursuant to Fed. R. Bankr. P.

7015, provides, inter alia, for the amendment of pleadings. Regarding amendments at trial, "[the court] shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense."[8] Fed. R. Civ. P. 15(b). The rule also permits the court to grant a continuance "to enable the objecting party to meet such evidence." Defendants usually gear their defenses towards the alleged facts and then argue the law. Because of that, if the factual allegations change midstream, "prejudice" often occurs, therefore, the rule is in place to prevent that from happening. When prejudice does not exist, however, the rule requires the court to allow the amendment "freely."

The Debtor contends that the Plaintiff did not allege "concealment of litigation" until it filed its summary judgment motion. His procedural defense would certainly work if the court could find that prejudice existed back then, however, the Debtor never asserted that in his response to the summary judgment motion nor did he argue that at the hearing. Furthermore, the court did not find any prejudice on its own. On the day of the summary judgment hearing, an adjourned date agreed to by the parties, the trial was more than one month away. The Debtor arranged for and produced his former bankruptcy counsel at trial without encountering unanticipated delay or any apparent damage to his defense. Finding prejudice did not exist, and to the extent that he did not withdraw his motion in limine at trial, the court overrules his technical, procedural argument against allowing the amendment.

B. Fed. R. Civ. P. 15(c)

Under Fed. R.Civ. P. 15(c)(2), the amendment of a pleading relates back to the date of the

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[8]Some courts have permitted the use of Fed. R. Bankr. P. 15(b) when considering an amendment in a summary judgment motion context. *See In re Bennett*, 220 B.R. 743, 752 (Bankr. N.D.N.Y. 1992) and cases cited therein.

original pleading if the claim asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. While the federal rule and the courts interpreting it liberally permit amendments, Fed. R. Bankr. P. 4007's time requirement for filing a complaint objecting to a discharge of a debtor is often strictly construed. In the Second Circuit, the 60-day deadline is a mandatory rule. *See In re Chalasani*, 92 F.3d 1300 (2d Cir. 1996).

Although the court is unaware of any controlling law in this district, many courts have reviewed creditors' attempts to amend a complaint to add additional § 727 causes of action and have faced the difficult task of balancing the liberality of Fed. R. Civ. P. 15 against the strictness of Fed. R. Bankr. P. 4007. Some have not permitted amendments to add a new theory of objection to discharge. *E.g., In re Lazenby*, 253 B.R. 536 (Bankr. E.D. Ark. 2000). Other courts have recognized, however, that while new or additional grounds for seeking a denial of discharge or an exception to discharge may not be added after Fed. R. Civ. P. 4004 and 4007's deadlines have passed, courts may permit amplification of the original complaint or an amended complaint filed pursuant to Fed. R. Civ. P. 15(a). *E.g., In re Halberstram*, 219 B.R. 356 (Bankr. E.D.N.Y. 1998); *In re Klein*, 31 B.R. 947 (Bankr. E.D.N.Y. 1983). According to one court, the test of whether an amendment constitutes a new ground or an amplification is determined by the sufficiency of the information provided to the party served. *In re Perez*, 173 B.R. 284, 293 (Bankr. E.D.N.Y. 1994). The obvious message behind that is litigants should not be denied their day in court because of inartfully drafted pleadings. *See In re Klein*, 31 B.R. at 951 (citing *Mooney v. Vitolo*, 435 F.2d 838 (2d Cir. 1970)).

As already found, the complaint contained seven paragraphs addressing the § 727(a)(4) cause of action. Essentially, the Plaintiff alleged that the Debtor made transfers to his sons and his father that were subject to being set aside under Ohio or New York law and that he did not schedule these certain revocable transfers as assets. While a more articulate complaint would have included an

allegation that the Debtor did not list the Plaintiff's pending fraudulent conveyance lawsuit on his original Statement of Financial Affairs, the court finds "amplification" is warranted because of the sufficiency of the information contained in the complaint. *In re Perez*, 173 B.R. at 293. While this court also believes the objection to discharge deadline should be strictly construed, the facts of this particular case warrant allowing the amendment to relate back. It is clear to the court that the complaint's allegations centered on the Debtor's failure to apprise the court, the trustee and his creditors of the possibility of recovering transfers under Ohio or New York law. Allowing an amendment to include the allegation about his failure to list the pending fraudulent conveyance lawsuit, the Plaintiff's New York state court mechanism to recover the Ohio wrongful death lawsuit settlement proceeds, seems to fall within the permissible amplification realm and, as the Second Circuit has articulated, allows an otherwise inartfully drafted pleading to go forward. *In re Klein*, 31 B.R. at 951.

II. § 727(a)(4)(A)

As this court has already articulated, "a denial of discharge is an extremely drastic and harsh sanction; it is the death penalty of bankruptcy." *Paul A. Levine, Chapter 7 Trustee v. Richard H. Raymonda ("In re Raymonda")*, Case No. 99-13523, Adv. Proc. No. 99-91199, p. 4 (February 9, 2001). Therefore, the party objecting to discharge, pursuant to § 727(a)(4)(A), bears the burden of establishing, by a preponderance of the evidence, that:

i. the debtor made a statement under oath;

ii. such statement was false;

iii. the debtor knew the statement was false;[9]

[9]Plaintiff's counsel incorrectly stated this prong as "knew or should have known." (Argument p. 14.)

iv. the debtor made the statement with fraudulent intent; and

v. the statement related materially to the bankruptcy."

*In re Raymonda,* p.5 (citing *Grogan v. Garner*, 498 U.S. 279 (1991), *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 challenges the Debtor's discharge based on his failure to list several lawsuits, particularly the fraudulent conveyance lawsuit, and his scheduling the value of the Libyan lawsuit as zero.

A. Failure to List the Fraudulent Conveyance Lawsuit

Facts similar to *Raymonda* exist here: the Debtor made a false statement under oath by signing his Statement of Financial Affairs under the penalty of perjury and omitting several lawsuits, including one very important one, from the list he provided in his answer to Question 4(a). Like the controversy in *Raymonda*, the questions here are whether the Debtor knew the statement was false when he made it and, if so, whether he made it with the necessary fraudulent intent. Like the debtor in *Raymonda*, the Debtor challenges the materiality of any omission.

According to the Debtor's own testimony, the main reason he filed his barebone petition was because of the fraudulent conveyance lawsuit,[10] in addition to the other pending state court lawsuits Mr. Corvetti had brought against him. Despite his admitted failure to list what was essentially "the reason" he filed, he asks this court for all of the Bankruptcy Code's protections. Combining his admitted failure with his involved court experience in his prior case where he survived his failure to list the Ohio wrongful death lawsuit and received a dismissal of that case instead of a denial of discharge, the court cannot accept his "simply a mistake" defense. The court has evaluated the Debtor's knowledge and education and his relevant bankruptcy experience and concludes he

[10]See n. 4.

knowingly made the sworn, false statement. *See In re Garcia*, 260 B.R. 622, 631 (Bankr. D. Conn. 2001). Moreover, the Debtor spent one and a half hours reviewing his schedules and statements before filing and his former counsel provided him with copies of what was filed and directed him to review the schedules and statements again. Adding in that the "missing page"/mistake explanation does not match up when the prefiling fax is compared to the answer the Debtor gave to Question 4(a) on the Statement of Financial Affairs, convinces the court that the Debtor knowingly left the lawsuit off of his Statement of Financial Affairs or, at a minimum, prepared it with reckless disregard. *In re Keeney*, 227 F.3d 679, 686 (7th Cir. 2000). The Plaintiff has satisfied the third prong of the test.

A false statement, however, is not necessarily a fraudulent one. *In re Arcuri*, 116 B.R. 873, 883 (Bankr. S.D.N.Y. 1990)(citing *In re Lovich*, 117 F.2d 612, 613-14 (2d Cir. 1942) and other cases). As courts have often recognized, a debtor's fraudulent intent is difficult, if not impossible, to prove directly, therefore, a plaintiff can prove fraudulent intent by circumstantial evidence. *In re Scott*, 233 B.R. at 44)(citing *In re Devers*, 759 F.2d 751, 754 (9th Cir. 1985). A "pattern of falsity" or a "cumulative effect of falsehoods" may establish fraudulent intent. *Arcuri*, 116 B.R. at 883 (citations omitted). Similarly, a court may infer fraudulent intent from a debtor's reckless indifference to or cavalier disregard of the truth. *Id*. (citations omitted). If a debtor is not prepared to provide honest answers, adopting instead a cavalier or arrogant attitude toward truthful disclosure, a bankruptcy court cannot, in good conscience, grant the discharge. *See In re Brooks*, 58 B.R. 462, 468 (Bankr. W.D. Pa. 1986).

The Debtor's actions in this case certainly includes a "pattern of falsity," beginning with his mid to late week contemplation of filing a barebone petition in the distant state of Maryland in order to stay the Monday trial. The Maryland Chapter 7 Trustee's observations, as found above, have provided the court with what it views as an insightful observation of the Debtor's filing. To that fiduciary, the

Debtor's filing in Baltimore was "to gain a tactical advantage" over his creditors. To the court, it was all that and more: it was his attempt to prevent the Plaintiff, Mr. Corvetti and the fiduciary in charge of administering his estate from having a full and fair opportunity to litigate a potential fraudulent conveyance recovery. It was his attempt to have that done in a remote forum before a judge and a trustee who would not have direct knowledge of all that happened in his prior case. As the Maryland Chapter 7 Trustee has also observed, it was his attempt to "make it extremely difficult for [his] creditors, the parties who have a real interest, to participate in the bankruptcy process, and pending litigation." Such a debtor does not deserve a discharge from this court. The Plaintiff has met the fourth prong.

As for the Debtor's amendment of his Statement of Financial Affairs, the court does not view that subsequent disclosure as "evidence of innocent intent." *Acuri*, 116 B.R. at 882. Similar to what happened in *Arcuri*, the Debtor did not amend until after an objection to discharge was filed. *Id*. Of course, any inference of innocent intent becomes slight, at best, when a debtor files in haste and amends at leisure. *Id*. Here, it is particularly true since the undisclosed item was admittedly in the forefront of the Debtor's mind and actually precipitated the filing. If anything, the Debtor should have checked and checked again to ensure the litigation was properly disclosed, if not for the reason that his failure to disclose the Ohio wrongful death lawsuit last time precipitated his dismissal, then for the reason that the pending trial was why he decided to file this time. Coupling the Debtor's "been down that road before" experience with the fact that he is an attorney who should know all of the implications of signing something under the penalties of perjury, the court completely discounts the fact that the Debtor did eventually file an amendment.

The court also does not view Debtor's reliance on *In re Barrett* as persuasive on this matter. The issue in *Barrett* was whether the debtor's prior bad behavior in previous filings should be

considered when making a determination as to whether he filed his latest case in good faith using a "totality of circumstances" test. *In re Barrett*, 964 F.2d at 592. The Sixth Circuit held that as long as the bankruptcy court addressed his prior bad acts in a totality of the circumstances analysis, the exact weight it ascribed to those acts was not relevant. *Id*. Here, the weight of the Debtor's prior "bad acts" is not at issue; it is his personal knowledge of the bankruptcy court process and the critical requirement of complete and candid disclosure that he should have walked away with when the court dismissed his prior case. Thus, the court finds *In re Barrett* inapposite.

The court has already commented on "materiality," the remaining prong. In *Raymonda*, the court observed that district courts and bankruptcy courts in the Second Circuit agree materiality exists if there is a relationship to the debtor's business transactions or estate or which would lead to the discovery of assets, business dealings or existence or disposition of property. *In re Raymonda*, p. 9 (citing *In re Murray*, 249 B.R. 223, 228 (Bankr. E.D.N.Y. 2000). Here, although the Debtor was a defendant in the lawsuits he left off his original Statement of Financial Affairs, the pending fraudulent conveyance state court action might have yielded a recovery for the creditors of his estate in this case. Concluding that the Debtor's failure to list that lawsuit meets the materiality prong is consistent with other courts that have concluded the relevance and importance of any question on a petition, schedule or statement is not for the debtor to make. *See Arcuri*, 116 B.R. at 881 and cases cited therein.

B. Scheduling the Libyan Lawsuit with a Zero Value

Courts have considered the effect of a debtor undervaluing an asset in a § 727(a)(4)(A) context. *E.g., In re Weiner*, 208 B.R. 69 (B.A.P. 9th Cir. 1997); *In re Scott*, *supra*; *In re Wines*, 114 B.R. 794 (Bankr. S.D. Fla. 1990). In one of those decisions, *In re Weiner*, the bankruptcy court found the debtor knowingly and fraudulently undervalued a ring so that it came within the state's $2,500 statutory exemption. *Weiner*, 208 B.R. at 71. The Bankruptcy Appellate Panel for the Ninth Circuit, using a

"gross abuse of discretion" standard to review the bankruptcy court's decision to deny discharge, upheld the denial of discharge. *Id*. at 70, 72. The court commented that the debtor "failed in his duty to faithfully participate in the process by manipulating both the schedules and his testimony to retain possession of the ring." *Id*. at 72.

The court has already found the Debtor failed in his duty to disclose and he manipulated the bankruptcy system in his efforts to keep the wrongful death lawsuit proceeds from being examined for the benefit of his creditors. As for his duty to disclose a credible value of the Libyan lawsuit, it appears to the court that his litigation counsel, Mr. Gilman, shared the same "unknown" opinion the Debtor had when he scheduled the lawsuit. As found above, although a setoff might exist for the amount of compensatory damages already received, potential recovery under the Foreign Sovereign Immunities Act would include punitive damages. (Facts pp. 13-14.) Mr. Gilman did testify, however, that such a recovery was an "if anything" scenario.

Both the Debtor and Mr. Gilman opined that the potential recovery against the Libyan government falls far short of a slam-dunk win. The court finds the potential recovery against that entity is "unknown," therefore, Washington 1993, Inc. has not met its burden with regard to the allegations contained in paragraphs 43 and 44 of the complaint.

III. 11 U.S.C. § 523

As discussed in the Facts above, the court granted the Debtor's motion to dismiss the Plaintiff's 523(a)(6) cause of action. (Facts p. 14.) On October 27, 2000, the Debtor filed a motion to dismiss the Plaintiff's 523(a)(4) cause of action. The court did not rule on that motion during trial. However, because of the denial of discharge in this case, the court need not address the remaining causes of action under §§ 523(a)(2)(A), 523(a)(2)(B) and 523(a)(4).

Accordingly, it is

ORDERED that the Debtor's discharge is denied pursuant to 11 U.S.C. § 727(a)(4)(A).

Date:

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