IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA

In re:

Emmanuel N. Mavinga **Case No. 15-01330-als7**

Debtor(s)

United States Trustee **Adv. Pro. 15-30041-als**

Plaintiff

v.

Emmanuel N. Mavinga

Defendant.

MEMORANDUM OF DECISION
(date entered on docket: December 8, 2016)

BACKGROUND FACTS

Emmanuel Mavinga was born and lived in the Ivory Coast of West Africa where he obtained the equivalent of a high school education. While still a young man in the 1990's he came to America for better opportunities and to escape political conflicts in his home country. At that time he knew some basic words but could not read or write in English. He participated in a one year program upon his arrival to learn the language. Since that time, Mavinga has served in the U.S. Armed Forces, worked as a manual laborer, obtained an Associate Degree from Des Moines Area Community College and worked in a factory setting. Eventually he was employed by Secured Commerce handling sales and customer service issues related to retail credit card transactions. About 10 years ago he started Merchants Services ("Merchants") as a sole proprietorship. It provides credit card terminals and services to small businesses. Revenues are based upon a percentage of sales or residuals which are paid under a variety of agreements that Global Systems ("Global") tracks and manages. At one point in time there were 10-20 independent contractors or representatives affiliated with Merchants in various states.

Certified Payment Processing (CCP) initiated a lawsuit against Mavinga and other defendants in Polk County Iowa. Summary judgment was granted in favor of Mavinga. Sometime later, CPP again filed suit against Mavinga, this time in Texas. When he could no longer afford to continue litigating with CPP, Mavinga investigated the possibility of filing bankruptcy and engaged Peter Rolwes to represent him. In preparation for the filing, an electronic questionnaire requesting information about assets, liabilities and finances was provided to Mavinga. This questionnaire was returned to Rolwes and apparently served as the source for the documents that were prepared, signed by Mavinga and filed with the Court.

A 341 Meeting was conducted on August 6, 2015. At that time it became clear that there were problems with the information provided in Mavinga's filing. Specifically, the Statement of Financial Affairs indicated that he had earned the following amounts from wages or operation of his business:

AMOUNT	SOURCE
$15,875.00	2013 1040[1]
$33,803.00	2014 1040
$3,902.29	2015 YTD

Schedule I reflected his monthly income as $0.00. The Means Test form states that Mavinga receives monthly income of $4,004.90[2]. Mavinga believed that he was able to meet his monthly expenses although those amounts substantially exceeded the monthly income stated on his schedules. Mavinga does not deny that there were errors on his filed schedules. His attorney stated that due to an illness of a staff member these items were not corrected before filing and amendments would be forthcoming to supply accurate information.

On September 18, 2015 the U.S. Trustee filed a complaint objecting to Mavinga's discharge under 11 U.S.C. §§ 727(a)(3) and (a)(4)(A). Deadlines were established for discovery, pre-trial motions and a trial date was scheduled. During discovery these deadlines were extended multiple times and the parties had a number of disputes which required court intervention. Meanwhile, the amended schedules promised at the 341 Meeting were not filed until January 21, 2016. One day later Mavinga filed a Motion to Convert his case to chapter 13 along with a chapter 13 plan. The United States Trustee objected to the Motion to Convert. Several months later Rolwes' Motion to Withdraw as Mavinga's counsel was granted. New counsel entered an appearance and trial on the complaint objecting to discharge and a hearing on the Motion to Convert were scheduled simultaneously. Prior

[1] This same information is duplicated in response to question 2 on the Statement of Financial Affairs.
[2] This amount, combined with his non-filing spouse's income, yielded a calculation that did not trigger a presumption of abuse under 11 U.S.C. § 707(b).

to trial, the United States Trustee filed a Motion in Limine seeking to preclude any evidence that could be presented by Mavinga related to an advice of counsel defense which was granted by the Court.

DISCUSSION

Denial of a debtor's discharge defeats an essential purpose of bankruptcy relief, the concept of a fresh start. *See Korte v. United States* (*In re Korte*), 262 B.R. 464, 471 (B.A.P. 8th Cir. 2001). The statutory provisions found at 11 U.S.C. § 727 are liberally construed in favor of the debtor while also insuring the bankruptcy process is not abused. *Strauss v. Brown* (*In re Brown*), 531 B.R. 236, 256 (Bankr. W.D. Mo. 2015). The objecting party bears the burden of proof on each of the elements identified in the statute by a preponderance of the evidence. *Korte* at 471.

1. 11 U.S.C. § 727(a)(3)

Debtors have a duty to maintain records that are sufficient to explain their financial transactions. Discharge may be denied if:

> the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

11 U.S.C. § 727(a)(3). The initial burden is on the party objecting to discharge to prove two things: (i) that the debtor "concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information"; and (ii) that the recorded information was information "from which the debtor's financial condition or business transactions might be ascertained." Intent is not a required element of proof under this code provision. If the party objecting to discharge proves these two requirements, the burden then shifts to the debtor to prove that "such act or failure to act was justified under all of the circumstances of the case." *Lassman v. Keefe,* (*In re Keefe*), 380 B.R. 116, 120 (Bankr. D. Mass. 2007) (citing *Campana v. Pilavis* (*In re Pilavis*), 244 B.R. 173, 176 (B.A.P. 1st Cir. 2000)). Objections to discharge under this code section are fact specific and must be considered on a case-by-case basis. *In re Cromer*, 214 B.R. 86, 97-98 (Bankr. E.D.N.Y. 1997).

In this case, as a result of the information obtained at the 341 Meeting and the inconsistent information contained in the schedules, the U.S. Trustee asked Mavinga to provide copies of his business records, tax returns, bank accounts and documentation for monthly expenses. In response to these requests Mavinga supplied a number of bank statements, some of which were in his personal name and some in Merchants' name. Detailed information related to accounts receivables owed to

Merchants or amounts paid to sub-contractors were not initially provided. The U.S. Trustee contends that the items they did receive are insufficient to ascertain Mavinga's financial transactions.

Merchants' business is performed by Mavinga and a number of other independent contractors from which he is paid a percentage of their revenues. A company called Global handles all of the documents related to customer transactions and collects the fees owing. It withholds any funds that are payable to some of the independent contractors and for other expenses, and then Global pays either the independent contractor or Mavinga. In some instances, after receiving his proceeds, Mavinga would then pay a portion to any individuals he worked with directly and whose arrangements were apparently not handled by Global. Merchants does not have a formal office. Instead, Mavinga uses his home and car to conduct his business. He admits he does not maintain extensive business records and he does not have any balance sheets, income statements, profit/loss statements or cash flows for Merchants.

Mavinga describes himself as an unsophisticated businessman who is unaware of standard business practices. He states he is not an accountant or lawyer, and that he does not know how to create or understand many financial documents. He almost totally relied on Global to monitor his financial transactions and to maintain the records which detailed his revenue stream. In an effort to satisfy the U.S. Trustee, Mavinga hired a CPA to create a summary of his business transactions. Nothing in the record suggests the CPA was provided different or additional items from those supplied to the U.S. Trustee. According to the testimony, these same items were provided to H&R Block to prepare his tax returns. The analyst at the U.S. Trustee's office stated that there continued to be a lack of source documents and the CPA's summary and the tax returns could not be reconciled.

"The law is not unqualified in imposing a requirement to keep books or records, and it does not require that if they are kept they shall be kept in any special form of accounts." *In re Cromer*, 214 B.R. at 97 (citing *In re Underhill*, 82 F.2d 258, 259-60 (2d Cir. 1936)). It is a question in each instance of reasonableness in the particular circumstances. Courts have wide discretion in determining whether the files produced are inadequate and whether such inadequacy was justified. *See In re Goff*, 495 F.2d 199, 202 (5th Cir. 1974). A court may consider all of the circumstances of the case, including the debtor's sophistication, the complexity of the debtor's business, and whether others in similar circumstances would have kept books and records. *See In re Cromer*, 214 B.R. at 99.

There is no question that Mavinga's record keeping is haphazard and leaves something to be desired. But, it is not unusual for a sole proprietorship to have financial records that fall short of those expected of a corporate entity. Given Merchants' size and the manner in which Mavinga conducted his business, the Court concludes that justification exists to excuse Mavinga from maintaining traditional financial reports. The U.S. Trustee's objection under 11 U.S.C. § 727(a)(3) is denied based upon this statutory exception.

2. 11 U.S.C. § 727(a)(4)

"To receive the 'fresh start' the Bankruptcy Code offers, a debtor must present accurate and truthful information about himself and his affairs. All assets and ownership interests must be disclosed, and all questions in the schedules and statement of financial affairs must be answered completely and honestly." *In re Olbur*, 314 B.R. 732, 744 (Bankr. N.D. Ill. 2004) (citations omitted). A debtor's discharge may be denied under § 727(a)(4)(A) if the debtor knowingly and fraudulently made a false oath in connection with his or her bankruptcy case. 11 U.S.C. § 727(a)(4)(A); *Ellsworth v. Bauder* (*In re Bauder*), 333 B.R. 828, 830 (8th Cir. 2005). Specifically, § 727(a)(4)(A) requires a showing 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.

In re Klutchko, 338 B.R. 554, 567 (Bankr. S.D.N.Y. 2005) (quoting *Carlucci & Legum v. Murray* (*In re Murray*), 249 B.R. 223, 228 (E.D.N.Y. 2000)). The plaintiff bears the burden of proof on each of these elements. *Id.* at 567. Three of the required elements under § 727(a)(4) are essentially undisputed or clearly established by the evidence in this case. Statements made on a debtor's Schedules or Statement of Financial Affairs, along with statements made by a debtor during the bankruptcy proceedings constitute an oath. *Tow v. Henley* (*In re Henley*), 480 B.R. 708, 766 (Bankr. S.D. Tex. 2012). Inaccurate or omitted information constitutes a false oath under this discharge exception. *See Kaler v. Craig, (In re Craig*), 195 B.R. 443, 451-52 (Bankr. D.N.D. 1996); *Britton Motor Serv., Inc. v. Krich (In re Krich*), 97 B.R. 919, 923 (Bankr. N.D. Ill. 1988); *Bailey v. Bailey (In re Bailey*), 53 B.R. 732, 735 (Bankr. W.D. Ky. 1985); see also *Mertz v. Rott*, 955 F.2d 596 (8th Cir. 1992). By signing his schedules under penalty of perjury when those documents contained incorrect information Mavinga made a false oath for purposes of 11 U.S.C. § 727(a)(4). Materiality requires that the statement at issue relate to the estate or the debtor's business transactions. *Fokkena v. Huff* (*In re Huff*), 349 B.R. 587, 592 (Bankr. S.D. Iowa 2006) (citing *Palatine National Bank of Palatine, Illinois v. Olson (In re Olson*), 916 F.2d 481, 484 (8th Cir. 1990)); *Klutchko*, 338 B.R. at 568. Clearly, the income information of both Mavinga and Merchants are relevant to the bankruptcy filing. The only remaining issues to be determined involve Mavinga's knowledge and fraudulent intent. In this Circuit, circumstantial evidence can be used to prove intent, and "statements made with reckless indifference to

the truth are regarded as intentionally false." *In re Korte*, 262 B.R. 464, 474 (B.A.P. 8th Cir. 2001). There is no requirement that a debtor intend that his or her conduct will injure creditors. *Huff*, 349 B.R. at 592.

Mavinga testified he understood there were errors that required correction before his bankruptcy was filed and he provided information to his attorney for that purpose. He states he signed the petition and schedules without reading them and just assumed the corrections had been made. Such conduct does not excuse a failure to disclose correct information in response to items requested on the petition and bankruptcy schedules. "A debtor cannot, merely by playing ostrich and burying his head deeply enough in the sand, disclaim all responsibility for statements which he made under oath." *In re Retz*, 606 F.3d 1189, 1199 (9th Cir. 2010); *see In re Hughes*, 490 B.R. 784, 793 (Bankr. E.D. Tenn. 2013); *Olbur*, 314 B.R. 732, 746 (Bankr. N.D. Ill. 2004).

On January 21, 2016, over 5 months after the 341 meeting, and after the United States Trustee filed its complaint, amended schedules were filed with the Court. The timing or delay in filing amendments to the schedules can result in a denial of discharge. *In re Letlow,* 385 B.R. 782, 796 (Bankr. N.D. Ga. 2007). Under cross examination the U.S. Trustee's financial analyst stated that some of the errors on Mavinga's schedules were consistent with those made in other cases, but the number of errors was much higher. Mavinga's amendments regarding his income were substantial:

- Schedule I was amended to change Debtor's monthly income from $0 to $9,402.33.
- Schedule J was amended to reflect $1,463. Previously Debtor's monthly net income was reflected as -$6,038.94.
- Statement of Financial Affairs was amended to state that YTD income of $56,414.00 which is $52,511.71 higher than the amount contained in the original filing.
- Statement of Current Monthly Income was amended and resulted in an income figure above the Median for the State of Iowa and states there is a presumption of abuse.

Amendments to Schedules A, B, C, D and F were also filed. *In re Cecil* involved a debtor who admitted she filled out her schedules without doing a thorough investigation and ended up doing a poor job. The determination that she was not merely sloppy or careless, but that these actions were done with reckless indifference in failing to disclose assets of significant, not trivial value, was affirmed. 542 B.R. 447, 455 (B.A.P. 8th Cir. 2015). The number and substance of the errors contained in Mavinga's schedules shows a pattern of reckless indifference to the accuracy and truthfulness of the information provided in his bankruptcy filing. *See In re Khalil*, 379 B.R. 163, 174 (B.A.P. 9th Cir. 2007).

The focus of Mavinga's defense is that he completed the paperwork and supplied information to the best of his ability based upon his language limitations. This position is not persuasive and is not supported by the record. There are numerous examples that Mavinga has a sufficient understanding of English to file accurate and complete bankruptcy schedules. He successfully earned an Associate Degree and was employed in his field of study. Over a number of years he has operated a successful business. Mavinga's testimony demonstrates that: he understands the concepts of income and expenses; he can provide details as to the nature and processes of his business; he can estimate his profit margin; he had access to records that tracked accounts receivable and contractor payments; he had the ability to describe a varied compensation structure for multiple representatives and could explain how it worked; he managed numerous bank accounts; and he compiled information and delivered it to H & R Block for preparation of his tax returns. Mavinga was able to distinguish the difference between his interests and obligations, and those of his wife. The deposition taken by the U.S. Trustee reveals that Mavinga has the capability to ask for clarification if he did not understand a question or to parse the meaning of a question before responding. There is no evidence that Mavinga did not understand the forms he was asked to complete. And, if he did have questions, there is nothing in the record that suggests that he asked for any assistance or attempted to clarify that the information he provided was adequate.

The record supports a determination that Mavinga had knowledge and access to the necessary information regarding his financial affairs and that the inaccuracies appearing in his filed documents represent a reckless indifference or disregard for the truth of the information supplied. For the reasons stated, Mavinga's discharge is denied pursuant to Count II of the complaint under 11 U.S.C. § 727(a)(4).

3. Motion to Convert and Objection

Mavinga filed amendments to his bankruptcy schedules, including the Means Test on January 21, 2016. The same day, a Motion to Convert his case to chapter 13 was filed. The U.S. Trustee filed an objection to his Motion. Because the evidence to be presented in both the adversary proceeding and the Motion to Convert and Objection thereto was substantially the same, the matters were scheduled simultaneously. Neither party specifically argued the issues involving the Motion to Convert at the time of trial. It is unclear whether Mavinga's Motion to Convert was filed due to the fact that a presumption of abuse arose under his amended Means Test form, or whether it was an attempt to avoid trial on the complaint seeking to deny his discharge. It is equally uncertain whether the Objection filed by the U.S. Trustee was based on one or both of these grounds.

In light of the status of the adversary proceeding at the time the Motion to Convert was filed and the position set forth in the Objection, it is logical to infer that the U.S. Trustee's objection to the Motion to Convert was filed to prevent conversion before trial on its adversary complaint. Because discharge was denied under 11 U.S.C. § 727(a)(4) further analysis of the issues raised related to the Motion to Convert is unnecessary. Mavinga shall have 14 days from the date judgment is entered in adversary proceeding number 15-30041 to withdraw his Motion to Convert. In the event the Motion is not withdrawn, the case shall be converted to chapter 13.

Conclusion

Based upon the foregoing, IT IS HEREBY ORDERED that:

1. Count I of the complaint under 11 U.S.C. §727(a)(3) is dismissed.
2. Mavinga's discharge is denied pursuant to Count II of the complaint under 11 U.S.C. § 727(a)(4).
3. The Objection filed to Mavinga's Motion to Convert is moot.
4. Judgment shall enter accordingly.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in this Adversary Proceeding