UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In re:	:	**Case No. 01-04616-WH**
	:	
DENNIS LEE HOCKABOUT and CAROL LEE HOCKABOUT,	:	**Chapter 7**
Debtors.	:	
- -	:	
CITIZENS BANK dba CITIZENS EXECUTIVE LEASING,	:	**Adv. No. 01-20202**
Plaintiff,	:	
v.	:	
DENNIS LEE HOCKABOUT and CAROL LEE HOCKABOUT,	:	
Defendants.	:	

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ORDER—PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

On October 11, 2002, the court conducted a telephonic hearing on Plaintiff's Motion for Summary Judgment in the above captioned adversary proceeding. Thomas O. Ashby represented Plaintiff Citizens Bank dba Citizens Executive Leasing, and William P. Rickabaugh represented Defendants Dennis Lee Hockabout and Carol Lee Hockabout. At the conclusion of the hearing, the court took the matter under advisement. Post-hearing briefs have now been received, and the court considers the matter fully submitted.

The court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157(b)(1) & 1334 and order of the United States District Court for the Southern District of Iowa. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) & (J). The court, upon review

of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

As a preliminary matter, the court notes that Local Bankruptcy Rule 14(h) requires a motion for summary judgment to be accompanied by a separate statement of material facts as to which the moving party contends that there is no genuine issue to be tried. A resistance to the motion for summary judgment should include a separate statement of facts to which the adverse party contends that there is a genuine issue to be tried.

The moving party in this matter, Citizens Bank, did not provide such a separate statement. Along with its motion, Plaintiff filed a brief in support of the motion. The text of the brief sets forth the specific facts that Plaintiff relies upon to support its motion. Local Rule 14(h) provides that "[f]ailure to comply with this rule by the moving party may result in the denial of the motion." However, neither Dennis, nor Carol Hockabout identified contested facts prior to hearing, nor did they raise a procedural objection grounded on the local rule. On its own volition, the court reviews the record, including the affidavits and pleadings, and finds the following facts to be undisputed.

1. Dennis Lee and Carol Lee Hockabout (hereinafter collectively Debtors or Hockabouts) filed a petition for chapter 7 protection with the United States Bankruptcy Court for the Southern District of Iowa on September 6, 2001. Along with the petition, they also filed all their schedules and statements except for schedules D, E, and F. The missing schedules were filed on September 19, 2000.

2. Debtors scheduled real property valued at $100,000.00 located in Tabor, Iowa, and personal property valued at $19,750.00. They identified the real property as their personal residence and claimed it as their homestead. The personal property consisted of furniture and appliances valued at $2,000.00, a 1997 Ford F-350 Pickup valued at $13,000.00, a 1986 Mazda valued at $250.00, and a 1995 Mercury Village Van. Debtors scheduled no other property.

3. On their Statement of Intentions, Debtors stated that they intended to redeem a boat pursuant to 11 U.S.C. § 722. Under "Creditor's name," Debtors stated "None."

4. On Schedule I, Debtors stated that their entire monthly income was comprised of social security payments totaling $1,400.00.

5. Debtors scheduled secured claims totaling $409,488.16 and unsecured claims of $127,027.81. Debtors scheduled Citizens Bank as holding a secured claim for $50,033.00.

6. To date, debtors have not amended their schedules.

7. On December 12, 2001, Citizens Bank commenced this adversary proceeding objecting to Debtors' discharge and objecting to the discharge of its claim.

8. Citizens Bank's counsel served three sets of Requests for Admissions, totaling fifty requests, on Debtors counsel on January 25, 2002, January 30, 2002, and April 30, 2002. The requests for admissions included the following:

> No. 3: That after Dennis Hockabout incurred obligations to Plaintiff, Debtors placed or purported to place property into a trust controlled by one or both Debtors or by a relative, attorney or accountant of one or both Debtors.

No. 4: (As used hereinafter, the "Living Trust" is defined as a trust or purported trust established by one or both Debtors after Dennis Hockabout incurred obligations to Plaintiff and after Plaintiff had informed Dennis Hockabout that Plaintiff believed or alleged the obligations were delinquent.)
That the fair market value of property Debtors placed in or purported to place in the Living Trust exceeded $5000.00 at the time of placement or purported placement into the Living Trust.

No. 5: That the fair market value of Dennis Hockabout's assets was less than the amount of his debts throughout 2000 and 2001.

No. 6: That, at all times after she signed the mortgage in favor of Plaintiff dated December 3, 1999, the fair market value of Carol Hockabout's assets was less than the sum of (a) the debt secured by such mortgage and (b) Carol Hockabout's debts owed to legal persons other than Plaintiff.

No. 12: That Debtors formed, funded or allowed Dennis Hockabout to fund the Living Trust because they wanted to preserve assets from Plaintiff (or Plaintiff and other creditors) and knew Debtors or at least Dennis Hockabout were delinquent in obligations owed to Plaintiff (or Plaintiff and other creditors).

No. 13: That Debtors, until questioned under oath at their bankruptcy Section 341 meeting of creditors, intentionally concealed from the bankruptcy trustee (or the bankruptcy trustee and their creditors) the existence and business of "Global Environmental Services."

No. 14: That Debtors, when first asked at their section 341 meeting of creditors if their bankruptcy schedules and statements of financial affairs were accurate, stated they were accurate, and that Debtors so stated because, among other things, Debtors intended to conceal from the bankruptcy trustee the existence and business of "Global Environmental Services."

No. 19: That debtors, knowing they or one of them owned a 1994 aluminum boat of at least 19 feet in length and a boat trailer on the date they filed their bankruptcy petition, failed to schedule in their bankruptcy schedules such boat and trailer, the fair market value of which as of the date Debtors filed bankruptcy exceeded $6,500.00.

No. 22: That "Bronco Billy's" is a trade name of Jim Hunter, according to Debtors' information and belief.

No. 24: That Debtors, or Dennis Hockabout, gave or purportedly gave "Bronco Billy's" a lien on his 1997 Ford pickup because Dennis Hockabout or Debtors

wanted to delay or hinder Plaintiff's attempts to collect on a judgment Plaintiff had against Dennis Hockabout.

No. 25: That at the time Debtors or Dennis Hockabout gave or purportedly gave a lien to "Bronco Billy's' on a 1997 pickup, Debtors knew they did not have sufficient cash or liquid assets available to pay Citizens Bank and that Citizens Bank had a judgment against Dennis Hockabout.

No. 27: That Dennis Hockabout, at least during the first eight months of 2001, had an intentional arrangement with "Southern Cross" that he would not receive a paycheck for services supposedly provided by Dennis Hockabout to "Southern Cross."

No. 28: That during at least some time in 2001, Dennis Hockabout intentionally declined to request a paycheck for services he purportedly rendered to "Southern Cross" because Dennis Hockabout wanted to delay or hinder Plaintiff's ability to garnish or otherwise seize any earnings of Dennis Hockabout.

No. 29: That Dennis Hockabout claims to have provided significant services to "Southern Cross' at least some time during the first eight months of 2001.

No 30: That, if the answer to the immediately preceding Request is affirmative, that the value of Dennis Hockabout's purported services to "Southern Cross" during the first eight months of 2001 exceeds $800.00.

No. 31: That Debtors or Dennis Hockabout actually transferred or purported to transfer a Mercedes "kit" vehicle to one or more grandchildren and received no funds or other property for such transfer.

No. 32: That Debtors engaged in or aided and abetted the actual or purported transfer described in the immediately preceding Request intending to hinder or delay Plaintiff's efforts to collect debt owed by Debtors or by Dennis Hockabout.

No. 35: That Debtors were insolvent at the time they purported to create a living trust.

No. 36: That Debtors created the purported living trust intending to conceal or hinder Plaintiff, and undertook such concealment and hindrance within one year before Debtors filed their Chapter 7 bankruptcy petition.

No. 37: That Debtors formed their purported living trust within one year before they filed their bankruptcy petition herein.

No. 38: That Debtors used "Southern Cross," which is an alter ego of Debtor Dennis Hockabout or Debtor Dennis Hockabout and one of his sons, intending to hinder, delay or defraud Plaintiff.

No. 39: That debtors attempted to have Dennis Hockabout receive earnings or other compensation through "Southern Cross," intending to hinder, delay or defraud Plaintiff.

No. 40: That, if the immediately preceding Request for Admission is admitted, such conduct included conduct by Debtors within one year before they filed their bankruptcy petition.

No. 41: That Debtors purported to grant "Bronco Billy's" a lien on Debtor Dennis Hockabout's pickup within one year before Debtors filed their bankruptcy case.

No. 42: That Debtors transferred their Mercedes "kit" vehicle to one or more of their grandchildren within one year before they filed their bankruptcy petition.

No. 43: That Debtors' failure to specify locations of records pertaining to Global Environmental Services and failure to specify locations of their other financial records in their bankruptcy schedule statement of financial affairs or [sic] knowing and fraudulent failures by Debtors.

No. 44: That Debtors received payments of $1,865.07, $1,346.99, and $1,111.47 in 2001 from trucking services contracts and intentionally used such funds for living expenses or other expenses, intending thereby to deprive Plaintiff from such funds.

No. 46: That Debtors transferred their Mercedes "kit" vehicle to one or more of their grandchildren for no consideration and as a gift.

No. 47: That Debtors transferred their Mercedes "kit" vehicle to one or more of their grandchildren because Debtors, or one of them, were concerned that Citizens Executive Leasing would try to execute on or otherwise obtain the Mercedes "kit" vehicle to satisfy the delinquent debt owed to Citizens Executive Leasing.

No. 48: That Debtors transferred their Mercedes "kit" vehicle with intent to hinder, delay or defraud Citizens Executive Leasing or one or more of their other creditors.

No. 49 That Debtors are intentionally failing to provide Plaintiff with copies of income records related to Debtor Dennis Hockabout or "Southern Cross" related to Hawkins-Marsh.

> No. 50: That Debtor Dennis Hockabout has provided significant services to Hawkins-Marsh and received through the guise or device of "Southern Cross," significant compensation from Hawkins-Marsh within one year before Debtors filed their bankruptcy petition.

9. Debtors failed to respond to the Requests for Admissions within thirty days of their service, and had not responded by the time of the hearing.

DISCUSSION

Federal Rule of Bankruptcy Procedure 7056 applies Federal Rule of Civil Procedure 56 to adversary proceedings and governs summary judgment. Summary judgment shall be granted if the court determines that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). There is no genuine issue of material fact unless there is sufficient evidence favoring the non-moving party for the finder of fact to return a verdict for that party, if the non-moving party is the party with the burden of proof. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A court considering a motion for summary judgment must view all the facts in the light most favorable to the non-moving party, and give the non-moving party the benefit of all reasonable inferences that can be drawn from the facts. Matsushita Electric Industries, Co., v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 574 (1962)); Rifkin v. McDonnell Douglas Corporation, 78 F.3d 1277, 1280 (8th Cir. 1996). The court is not to weigh the evidence, but determine whether there is a genuine issue of fact for trial. Johnson v. Enron Corporation, 906 F.2d 1234, 1237 (8th Cir. 1990); see also Anderson, 477 U.S. at 249; Celotex, 477 U.S. at 323-24; Matsushita, 475 U.S. at 586-87.

Procedurally, the moving party "bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of [the record which show lack] of a genuine issue of material fact." Celotex, 477 U.S. at 323; see also Reed v. Woodruff County, 7 F.3d 808, 810 (8th Cir. 1993). Rule 56 does not require the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. "When a moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. The non-moving party is required by Rule 56(e) to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," to designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Mclaughlin v. Esselte Pendaflex Corp., 50 F.3d 507, 511 (8th Cir. 1995).

In this case, Plaintiff Citizens Bank, requests summary judgment asking the court to deny Debtors discharge pursuant to 11 U.S.C. § 727(a). It contends that Debtors failed to fully disclose assets on their bankruptcy schedules, thereby making a false oath in connection with this case and attempting to conceal. Citizens Bank further contends that Debtors failed to maintain appropriate records and that they transferred valuable assets within one year of filing for bankruptcy protection with the intent to hinder, delay, or defraud their creditors.

In support of its motion, Citizen's Bank offered an unofficially transcribed transcript of the meeting of the creditors, various documents, and fifty requests for admission to which Debtors failed to respond. Citizens Bank argues that under the

Federal Rules of Bankruptcy Procedure Debtors have admitted to all the elements required under § 727(a)(2), (3), & (4). Therefore, the facts are undisputed and summary judgment is appropriate as a matter of law. The court agrees.

Rule 36 of the Federal Rules of Civil Procedure governs request for admissions and is made applicable to bankruptcy proceedings by Bankruptcy Rule of Federal Procedure 7036. Rule 36 provides as follows:

> (a) **Requests for Admission**. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in requests that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of the documents described in the request. . . .
>
> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter. . . .
>
> (b) **Effect of Admission**. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission . . . .

Fed. R. Civ. P. 56(c) specifies that "admissions on file" can be an appropriate basis for the entry of summary judgment. It is also settled that "[a]dmissions made under rule 36, even default admissions can serve as a factual predicate for summary judgment. Rule 36(b) provides that a matter admitted is conclusively established." In re Niswonger, 116 B.R. 562, 565 (Bankr. S.D. Ohio 1990) (citations omitted).

Debtors were served with three sets of Requests For Admissions. They did not respond with written answer or objection within the thirty-day time period provided by Fed. R. Civ. P. 36. In its post-hearing brief, Citizens Bank identified the thirty-two

statements as relevant to its action under § 727(a)(2), (3), & (4). The court determined that Request No. 29 was logically relevant based on the reference made to it in Request No. 30. The court finds that Debtors may not have personal knowledge of the subject matter of Request No. 23, that would allow them to admit to the truth of the matter, and therefore the court finds it is irrelevant to Citizens Bank's cause. Debtors have not moved for amendment or withdrawal of the admissions. Accordingly, the court finds that the thirty-two statements are deemed admitted.

Section 727 of title 11 provides that court shall grant the debtor a discharge unless one of ten enumerated exceptions exists. Relevant to this proceeding are the following paragraphs:

> (a) (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
>
> > (A) property of the debtor, within one year before the date of the filing of the petition; or
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> * * *
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> (3) 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;
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case--
>
> > (A) made a false oath or account; …

11 U.S.C. § 727(a)(2), (3), & (4).

Sections 727(a)(2)(A) expressly mandates a finding that the debtors intended to hinder, delay, or defraud their creditors or an officer of the court. The Code requires

actual, not constructive fraud to deny discharge. See Lovell v. Mixon, 719 F.2d 1373, 1376-77 (8th Cir. 1983); Pavy v. Chastant (In re Chastant), 873 F.2d 89, 91 (5th Cir. 1989).

Likewise, § 727(a)(4)(A) includes an element of intent. The debtor must make a false account "knowingly and fraudulently." 11 U.S.C. § 727(a)(4). This court has held that the phrase "knowingly and fraudulently" requires that "there must be an intentional untruth in a matter material to the bankruptcy." In re Buchanan, No. 89-2774, Adv. No. 90-230 at 12. A matter is material to the bankruptcy "if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property." Palantine National Bank of Palantine, Illinois, (In re Olson), 916 F.2d 481, 484 (8th Cir. 1990) quoting In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984). A debtor's failure to schedule all assets may constitute a false oath and result in a denial of discharge under §727(a)(4). See Mertz v. Rott, 955 F.2d 596 (8th Cir. 1992) (failure to report state tax refund resulted in denial of discharge under § 727(a)(4)).

Unlike the above sections, intent is not an element of § 727(a)(3). Rather, it "imposes a standard of reasonableness," In re Wolfe, 232 B.R. 741, 745 (B.A.P. 8th Cir. 1999), requiring the debtor "'to take such steps as ordinary fair dealing and common caution dictate to enable creditors to learn what he did with his estate.'" Id. (quoting First State Bank of Newport v. Beshears (In re Beshears), 196 B.R. 468, 474 (Bankr. E.D. Ark. 1996) quoting Koufman v. Sheinwald, 83 F.2d 977 (1st Cir. 1936). Once a creditor has

made a prima facie showing that debtor did not produce adequate records, the debtor must justify why the particular records were not produced. Id.

Generally, "questions of motive and intent are particularly inappropriate for summary adjudication." P.H. Glatfelter Co. v. Voith Inc., 784 F.2d 770, 774 (7th Cir. 1986), quoting Cedillo v. International Association of Bridge & Structural Iron Workers, Local Union No. 1, 603 F.2d 7, 11 (7th Cir. 1979). However, in this case Debtors have admitted to the requisite intent to hinder, delay, or defraud a creditor within one year of the bankruptcy filing by transferring the "kit" vehicle for no consideration to their grandchildren and placing a lien in favor of Bronco Billy's on their Ford F-350 pickup truck. They have also admitted to knowingly and fraudulently making a false oath in connection with their case by failing to disclose their ownership of the boat and boat trailer and their interest in Global Environmental Services. Debtors also failed to disclose income and their interest in "Southern Cross." Finally, Debtors have failed to produce various financial records.

Accordingly, the court finds that there in no dispute as to any material fact, and Citizens Bank is entitled to summary judgment. The court will grant the motion for summary judgment and Debtors will be denied a discharge.

The court notes that in its post-hearing brief, Citizens Bank argued that its debt should be excepted from discharge under § 523(a)(6); however, the prayer of the motion for summary judgment only asked that Debtors be denied their discharge under § 727(a). Because the court grants summary judgment under § 727(a)(2), (3) & (4) and denies the discharge, the issue of § 523(a)(6) is rendered moot.

ORDER

IT IS THEREFORE ORDERED that Plaintiff Citizens Bank's Motion for Summary Judgment is GRANTED and Plaintiff's objection to discharge is sustained.

IT IS FURTHER ORDERED that Debtors Dennis Lee Hockabout and Carol Lee Hockabout shall be denied a discharge pursuant to 11 U.S.C. § 727(a)(2), (3) & (4).

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RUSSELL J. HILL, JUDGE
U.S. BANKRUPTCY COURT