

**UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa**

In re:	:	Case No. 01-06262-rjh-7
	:	
JOHN T. WALES,	:	Chapter 7
	:	
Debtor.	:	

KENNETH WALES, RUTH WALES,	:	Adv. No. 02-20068
RICHARD WALES, and KURT	:	
APPLEY,	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
JOHN T. WALES,	:	
	:	
Defendant.	:	

ORDER—PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

On June 6, 2003, the court conducted a telephonic hearing on Plaintiffs’ Motion for Summary Judgment in the above-captioned adversary proceeding. Gary A. Norton represented Plaintiffs Kenneth Wales, Ruth Wales, Richard Wales, and Kurt Appley, and William W. Hardin represented Debtor/Defendant John T. Wales. At the conclusion of the hearing, the court took the matter under advisement, 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

In this district, motions for summary judgment are 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.

Kenneth Wales, Ruth Wales, Richard Wales, And Kurt Appley (hereinafter Plaintiffs) provided such a separate statement along with a brief in support of the motion. John T. Wales (hereinafter Debtor) failed to file a statement of facts to which he contends that genuine issues remain for trial. Debtor also failed to offer evidence in the form of documents, affidavits, depositions, or set forth any facts in resistance to the motion. In essence, Debtor relies upon his denials in answer to the complaint. Accordingly, upon review of the record, the court finds the following facts to be undisputed.

1. Debtor filed a petition for chapter 7 relief on December 6, 2001, and the first meeting of creditors was scheduled for January 17, 2002. On February 28, 2002, Plaintiffs filed a motion to extend time to file a complaint objecting to discharge or to the dischargeability of a debt. The court entered a consent order granting the motion on March 27, 2002, and setting the final date to file such a complaint as May 2, 2002.
2. On April 26, 2002, Plaintiffs filed a complaint objecting to discharge and to the discharge of their claims. The complaint and accompanying summons were served upon Defendant on April 29, 2002.
3. Plaintiffs are creditors based on a judgment in their favor and against Debtor in a case before the Iowa District Court for Marion County, Law No.

LACV088456. On August 21, 2001, the state court entered judgment in the following amounts:

In favor of Kenneth Wales for \$678,100.00,
In favor of Richard Wales for 307,800.00,
In favor of Ruth Wales for \$103,950.00,
In favor of Kurt Appley for \$22,275.00,

along with interest and costs. The judgments were against Robert Wales, John Wales, and Brian Wales (hereinafter collectively the Judgment Defendants), jointly and severally. Court costs in the amount of \$149.25 were assessed against the defendants, jointly and severally.

4. The state court judgment was appealed, and the Iowa Court of Appeals affirmed the lower court judgment in a ruling entered on January 15, 2003.

5. Plaintiffs commenced the above-captioned adversary proceeding on April 26, 2002. The complaint is in five counts. Counts I –IV object to Debtor receiving a discharge. Count V objects to the discharge of the debt owed to Plaintiffs based on the alleged willful and malicious conversion of property.

6. Plaintiff Kenneth Wales is a retired veterinarian and farmer who lives in Akron, Iowa.

7. Plaintiff Ruth Wales is the wife of Kenneth Wales. She also lives in Akron, Iowa.

8. Plaintiff Richard Wales is the son of Kenneth and Ruth Wales. He lives in Rochester, Minnesota, where he is employed by IBM.

9. Debtor is Kenneth's brother, as is Robert Wales. Brian Wales is the son of Robert. The Judgment Defendants live in Bussey, Iowa. They are engaged in a variety of agricultural operations at a series of farms located in Iowa and Missouri.

10. Beginning in 1984, Plaintiffs entered into a contractual relationship with Judgment Defendants. Under the agreement, Plaintiffs placed breeding cattle into the care of the Judgment Defendants. Plaintiffs were to retain ownership of the cattle, were to receive the cash equivalent of 10% of the total investment or an equivalent number of calves, and the Judgment Defendants were to replace all dead, missing, or cull animals. The parties met annually to reconcile inventories and to determine the amount of cash or retained calves to be credited to each. Plaintiffs continued to place cattle under the agreement through the purchase of animals and retention of calves in lieu of cash payment.

11. At a meeting held on November 17, 1999, the Judgment Defendants told Kenneth Wales that the Plaintiffs no longer had any cattle held by the Judgment Defendants.

12. On August 24, 2001, the Judgment Defendants sold 632 head of cattle including 267 calves at the Knoxville Regional Livestock Market, Inc. On September 4 & 5, 2001, the Judgment Defendants sold 635 head of cattle including 166 calves at the Bloomfield Livestock Market, Inc. These sales comprised a liquidation of all but a few of the cattle claimed to be owned by the Judgment Defendants.

13. The state court determined that the Judgment Defendants breached their agreement with Plaintiffs. The state court found that they failed to account for 1304 head of cattle; 748 cows and 34 bulls placed by Kenneth Wales; 364 cows and 5 bulls placed by Richard Wales, 126 cows placed by Ruth Wales; and 27 cows placed by Kurt Appley. The state court further found that Defendants, Robert and Brian Wales, owed Kenneth Wales \$10,000.00 for the 1999 calf crop.

14. All of the Judgment Defendants have denied knowledge of the whereabouts of the cattle placed with them by Plaintiffs. The state court judge found that, “Viewed in light of the evidence, such a denial is not credible. In fact, it is absolutely incredible.”

15. In deposition testimony, Debtor denied knowledge of the whereabouts of the other cattle placed with Judgment Defendants and that all of Plaintiffs’ cattle died, strayed, were stolen, or were taken by Plaintiffs.

16. Plaintiffs’ damages, as found by the state court, are reasonable based on the evidence of the number of cattle placed, valuations made, and the fact that the agreement required Judgment Defendants to replace all dead, missing, or cull animals, whether from offspring or other replacement livestock.

17. In November of 2002, over a year after the filing of the bankruptcy petition, Debtor sent each of the Plaintiffs a federal Form 1099Misc. for the year 2000, and reported the same to the United States Internal Revenue Service. The amounts stated in each form are identical to the judgment amount that each was awarded against Debtor.

18. No payments, satisfaction of the judgment amounts, or other transfers to Plaintiffs from Debtor occurred during this time period.

19. Debtor failed to provide true and correct information on his Statement of Financial Affairs as follows:

- a. Section 1 — Debtor failed to disclose his gross income of the partial filing year as well as the two years preceding the filing year. He asserts a “Loss on the farm of \$20,927.00” for the previous year and “Approx. about the same” for the year before.

However, Debtor’s joint federal tax return for 1999 shows gross farm income on tax form Schedule F of \$17,091 and a farm loss of (\$21,418) because of non-cash depreciation expense based on nets assets of \$143,882, including 237 head of cattle. (Exh. # 14).

Debtor's joint federal tax return for 2000 shows "other gains or losses" of \$21,344, plus gross farm income on tax form schedule F of \$19,509. A farm loss of \$20,927 occurred because of non-cash depreciation expense based on nets assets of \$186,063, including 322 head of cattle. (Exh. # 15).

- b. Section 3 — Debtor failed to disclose payments on loans made within 90 days immediately preceding the date of his petition filing on December 6, 2001. As of September 12, 2001, Debtor owed State Bank of Bussey \$43,254.70 on a secured debt. On Schedule D, of his bankruptcy schedules, Debtor scheduled \$4,000.00 owed to the bank on a car loan. In the interim, the loan had been paid down by over \$39,000.00. (Exh. # 16 and 17).

Debtor failed to disclose a payment of \$16,500.00 to his nephew, Brian Wales, September 6, 2001. In his deposition, Debtor testified that he made the cash payment for hay received during prior months instead of paying with calves, since all cattle of his had been sold. (Dep. of Debtor, March 14, 2002, p. 83, ln. 24 - p. 90, ln. 11). (Exh. 18).

- c. Sections 7 or 10 -- Debtor disclosed the transfer of his one-half interest in thirty-seven acres of Missouri land, but not the date or circumstances. The transfer occurred August 28, 2001 — seven (7) days after the judgment was entered in favor of Plaintiffs. The deed of transfer was signed and delivered for filing on August 28, 2001.
- d. Section 8— Debtor failed to report the losses of cattle that he claimed in his 2001 farm book. In the report, he listed losses of 96 cows and 13 bulls as either lost, dead, or stolen for a total of 109 head. (Exh. # 21, pp. 10-11). He also listed sales of 163 cows and 20 bulls or a total of 183 head sold. (Exh. # 21. pp. 12 & 14).

On form 4797 of Debtor's 2001 federal income tax return, he lists sales of 294 head of cows and bulls. (Exh. 22). The difference of cattle sold shown in his tax return, 294, and the total sold shown in his farm book, 183, is 111 head. This appears to correspond to the 109 head "lost, dead or stolen" also shown in his 2001 farm book. (Part 2 of form 4797 of Debtor's 2001 federal income tax return shows sales of 44 cattle for which no price is entered.)

- e. Section 12 — Debtor failed to report that he has a safety deposit box. (Dep. of Debtor February 13, 2003, p. 130).
- f. Section 16(a) — Debtor failed to disclose the fact and location of his cattle/farm business either individually or in conjunction with his brother, Robert Wales, and/or Brian Wales, within the two years immediately preceding the Petition Date.

Debtor also failed to report that he is an officer of an active corporation,

Wales Brothers. Inc. (Dep. of Robert Wales, November 5, 2002, pp. 157-58).

- g. Section 17(d) — Debtor failed to disclose financial statements he issued in the two years immediately preceding this case. He gave financial statements to State Bank of Bussey in each of such preceding years. In fact, he had given a financial statement to this same bank for each of many preceding years. (Exh. # 23, 24, 25 and 26).
- h. Sections 18(a) and 18(b) — Debtor failed to disclose inventories of cattle in which he had an interest and the name and address of the person having possession of these records. Such inventories were taken on March 10, 1996, and January 20, 2000. (Exh. # 27, 28 and 29). Debtor's testimony shows that he knew who had conducted the January 20, 2000, inventory and had participated in the creating the second page of that inventory. (Dep. Of Debtor February 13, 2003, p.114, ln. 8 - p. 117, ln. 20). (Dep. of Robert Wales November 5, 2002, p. 83, ln. 14 - p. 98, ln. 25).

20. Debtor Wales failed to provide true and correct information on his

bankruptcy schedules as follows:

- a. Schedule B -- On Schedule F. Debtor lists unsecured creditor, Farm Plan, with a claim amount of \$12,381.81. Debtor testified that this was his line of agricultural credit, but Brian Wales incurred the charges on the credit line for his farming operation and made the payments thereon. As such, the balance due Farm Plan represents an account receivable due to Debtor from Brian Wales. Debtor failed to list this account receivable in his assets on Schedule B. (Dep. of Debtor, February 13, 2003, p.92, ln. 9 - p. 103, ln. 16; Exh. # 30; Exh. # 19 at pp. 55-58).
- b. Schedule C— Debtor claimed a homestead exemption in his bankruptcy schedules without reasonable basis to do so. The real estate claimed, 708 4th Street, Bussey, Iowa, was not his residence and had never been his residence, but was being rented to his daughter and her family.
- c. Schedule B — The real estate claimed by Debtor as exempt homestead, 708 4th Street, Bussey, Iowa, was not his residence and had never been his residence, but was being rented to his daughter and her family for \$325.00 per month. Debtor holds a one-half interest in such real estate, and his wife holds the other one-half interest. Debtor failed to list his one-half interest in the monthly rented income, i.e. \$162.50, in his assets on Schedule B. (Dep. of Debtor, March 14, 2002, p. 51, ln. 8 - p. 54, ln. 7).

21. The sales of cattle on August 24 and September 4 and 5, 2001, referenced

above, comprised a liquidation of all but a few of the cattle claimed to be owned by the

Judgment Defendants. Though the cattle were commingled at these three sales, the amount of proceeds from the sale on September 5, 2001, distributed to Debtor (two checks for \$30,343.36 and \$12,910.64) was within seventy cents of the exact amount of his debt to State Bank of Bussey, \$43,254.70, on all of his cattle notes. The same is true for Robert Wales, whose proceeds from the commingled cattle sales on September 5, 2001, (two checks for \$120,936.28 and \$58,694.72) resulted in a balance within fifty-nine cents of what he owed to State Bank of Bussey, \$179,621.59, on all cattle notes. The balance of proceeds for all other cattle sold on September 5, 2001, went to Brian Wales. (Exhs. # 8 – 13, 16, 17, & 33). The proceeds received by Debtor from the sales of cattle on August 24, and September 4 & 5, 2001, were not based solely on the number of cattle owned by Debtor, but arbitrarily calculated to pay off the debt owed to State Bank of Bussey.

22. Robert Wales testified that the inventory of cattle in January of 2000, included most, if not all cattle, branded or unbranded, in the locations where he, Debtor, and Brian Wales cared for cattle. He also testified that unbranded cattle would have been those owned by Plaintiffs. He also testified that a summary done separately on the same date, which included calves, accurately divided cattle owned by each of Robert Wales, Debtor, and Brian Wales. (Dep. of Robert Wales, November 5, 2002, p. 83, ln.14 - p. 98, ln. 25; Exhs. # 28 & 29).

23. The inventory of cattle dated March 10, 1996, without ownership designation, shows a total of 1399 head of cattle, 928 cows, bulls, and heifers and 471 calves. The inventory of cattle dated January 30, 2000, said to be a count of all cattle, including any owned by Plaintiffs, shows a total of 832 cattle, but without any calves.

The cattle sold by the Judgment Defendants at the August 24, and September 4 & 5, 2001 sales numbered 1267 head: 834 cows, bulls, and heifers and 433 calves. Plaintiffs placed 1304 cattle in the custody and care of the Judgment Defendants to be raised for breeding. Therefore, the sales by the Judgment Defendant had to include some or all of Plaintiffs' cattle. (Dep. of Robert Wales, November 5, 2002, p. 83, ln. 14 - p. 98, ln. 25; Exhs. # 27, 28, and 29).

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, Plaintiffs request summary judgment asking the court to deny Debtor discharge pursuant to 11 U.S.C. § 727(a) or alternatively, to except their debts from discharge pursuant to 11 U.S.C. § 523(a)(6).

Section 727 of title 11 provides that the 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

* * *

(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;

* * *

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.

11 U.S.C. § 727(a)(2), (3), (4), & (5).

A discharge under section 727 does not discharge an individual from certain debts. 11 U.S.C. § 523. Section 523(a) provides in relevant part that a debtor is not discharged from any debt:

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

11 U.S.C. § 523(a)(6).

Section 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)).

Section 523(a)(6) also requires intentional or willful conduct along with an element of malice. However, the elements of willfulness and malice must be analyzed separately. Barclays American/Business Credit v. Long (In re Long), 774 F.2d 875, 880 (8th Cir. 1985). "Willful" means intentional or deliberate. Id. "Malice" must apply to a heightened level of culpability that goes beyond recklessness if it is to have a meaning independent of willful. Johnson v. Miera (In re Miera), 926 F.2d 741, 743 (8th Cir. 1991). The Eighth Circuit Court defines willful as "headstrong and knowing" conduct and "malicious" as conduct "targeted at the creditor . . . at least in the sense that the conduct is certain or almost certain to cause . . .harm." Id. at 743-44. The act must be done with the actual intent to cause injury to the creditor. Kawaauhau v. Geiger, 523 U.S. 57, 61-64 (1998).

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). "A dispute over historical facts or inferences, if genuine and material within the meaning of Rule 56, precludes summary judgment." Schwarzer, Hirsch & Barrans, The Analysis and Decision of Summary Judgment Motions, at 14 (Federal Judicial Center 1991); but see In re Chavin, 150 F.3d 726 (7th Cir. 1998) (denial of knowledge may be so utterly implausible that no reasonable jury could find otherwise and, therefore, summary judgment is appropriate); Aubrey v. Thomas (In re Aubrey), 111 B.R. 268 (B.A.P. 9th Cir. 1989) (debtor provided insufficient proof to demonstrate genuine issue of material fact and summary judgment was appropriate to deny discharge).

In this case, Plaintiffs have produced evidence showing that Debtor breached a contract for raising cattle, and the state court so found. However, the state court's decision did not directly or even circumspectly address Debtor's intent in breaching the contract. It did not find that Debtor had the requisite deceptive intent; therefore, this court is not precluded from making an independent determination. See Arleaux v. Arleaux (In re Arleaux), 229 B.R. 182, 185 (B.A.P. 8th Cir. 1999) (setting forth the elements of claim preclusion or res judicata) and In re Miera, 926 F.2d at 743. (setting forth the elements of issue preclusion or collateral estoppel). In order to grant the motion for summary judgment, the court would have to weigh supporting exhibits, determine that Debtor's denial in his answer was not credible, and reach a determination of his intent. The court, mindful of the Eighth Circuit's admonition in Johnson, will not make such a determination on this summary judgment motion. Accordingly, the court will deny Plaintiffs' motion for summary judgment as to Counts I, III, and V.

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 a debtor did not produce adequate records, the debtor must justify why the particular records were not produced. Id.

In this case, the court determines that Plaintiffs have made a prima facie showing that Debtor did not produce adequate records. Plaintiffs provided the state court decision with its findings that they placed 1304 head of cattle under Debtor’s care. In that case, Debtor had the opportunity to explain what happened to the livestock, and he responded that he did not know. In response to this motion for summary judgment, Debtor failed to offer any records showing the delivery of animals, number of calves born, amount and expense of feed provided, veterinarian expenses, animals sold, animals retained, profit earned, loss incurred, or income tax returns. In short, Debtor failed to present evidence of even the most basic records that a person engaged in cattle raising would keep, let alone one who was caring for such a sizeable herd.

Further, the court finds that Debtor has not justified why he did not produce the particular records. Debtor failed to contest Plaintiffs’ statement of undisputed facts, and he did not provide any supporting documents along with his resistance or for use at the telephonic hearing. Therefore, the court must find that Debtor failed to keep adequate records concerning the care and disposition of Plaintiffs’ livestock.

Accordingly, the court finds that there is no dispute as to any material fact as to the allegations made in Count II of the complaint, and Plaintiffs are entitled to summary judgment on that Count. The court will grant the motion for summary judgment, and deny Debtor a discharge.

Plaintiffs also seek summary judgment under § 727(a)(5). Under that section, the plaintiff must show that the debtor formerly owned “substantial, identifiable assets that are now unavailable to distribute to creditors.” Turner v. Tran (In re Tran), 297 B.R. 817, 836 (Bankr. N.D. Fla. 2003); see also Flore, L.L.C. v. Sendecky (In re Sendecky), 283 B.R. 760, 765 (B.A.P. 2002) (plaintiff must prove facts showing “loss or shrinkage of assets actually occurred”). Once the prima facie case is made, the burden shifts to the debtor to provide a satisfactory explanation for diminution of assets. In re Tran, 297 B.R. at 836. “As with § 727(a)(3), the debtor should not offer a general oral explanation for the disappearance of substantial assets without documentary corroboration.” Id.

In this case, Plaintiffs have failed to establish that Debtor owned substantial, identifiable assets, and those assets are now unavailable to the estate for distribution to creditors. The thrust of their argument is that Debtor has not adequately explained the loss of the 1304 head of cattle that the state court found that they had placed with Debtor. Without citation of authority, Plaintiffs argue that the failure of the loss of any asset regardless of Debtor’s ownership of the asset sufficiently shifts the burden to a debtor to satisfactorily explain the loss or shrinkage. The court disagrees.

The plain language of § 727(a)(5) requires an explanation for the loss of assets that can be used to meet a debtor’s liabilities. Plaintiffs have failed to show how assets in which Debtor has no ownership interest, either legal or equitable, may be used to meet

his liabilities. In short, Plaintiffs have shown that they, and not Debtor, owned the 1304 head of cattle identified by the state court. Therefore, those cattle could not be considered estate property and could not be used to distribute among creditors. Accordingly, § 727(a)(5) is not an appropriate avenue to deny Debtor a discharge, particularly on motion for summary judgment.

Plaintiffs further argue that Debtor has not adequately explained the loss of some 109 or 111 head of cattle. Plaintiffs point to Debtor's farm book stating that 109 head were loss, stolen, or died and that he sold 183 head. They then note that his 2001 tax returns state that he sold 294 head that year. Plaintiff suggests that the discrepancy might actually be the "losses" allegedly sustained by Debtor.

Essentially, Plaintiffs argue that Debtor has not proven that he sustained losses of 109 head of cattle, and more than likely, the cattle he claimed were lost, stolen, or died, were actually sold by Debtor who disposed of the proceeds. Furthermore, Plaintiffs have raised the contention that the cattle sold by Debtor were not his to sell, but rather were their cattle.

Based upon the record currently before it and for the purposes of this summary judgment motion only, the court finds that there are genuine issues of fact as to the number cattle, if any, that Debtor actually owned, and whether the cattle sold in 2001 were cattle that he claimed to have been lost, stolen, or to have died. There is further an issue as to whether Debtor had an ownership interest in those cattle or whether they actually belonged to Plaintiffs. Accordingly, the court will not grant Plaintiffs' motion for summary judgment as to Count IV.

For all the foregoing reasons, the court will grant Plaintiffs' motion for summary judgment as to Count II and deny their motion as to Counts I, III, IV, and V. As a practical matter, the court's decision renders Counts I, III, IV, and V superfluous, at least to the extent that a trial would be necessary to determine the merits of each count. Since the court has denied Debtor a discharge, it would be an unreasonable use of judicial resources and those of the parties to require trial on these counts. Therefore, the court finds that its grant of summary judgment under § 727(a)(3) and denial of discharge effectively moots the remaining counts.

ORDER

IT IS THEREFORE ORDERED that Plaintiffs Kenneth Wales, Ruth Wales, Richard Wales, and Kurt Appley's Motion for Summary Judgment as to Count II is GRANTED and Plaintiff's objection to discharge is SUSTAINED. Plaintiffs' Motion for Summary Judgment as to Counts I, III, IV, and V is DENIED.

IT IS FURTHER ORDERED that Debtor John T. Wales shall be denied a discharge pursuant to 11 U.S.C. § 727(a) (3) and judgment shall be accordingly entered.

Dated: _____, 2004.

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