FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
September 7, 2007
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE KAREN K. PETERSON, Debtor.	BAP No. CO-07-043
ROSS, SCHROEDER AND ROMATZKE, Plaintiff - Appellant, v. KAREN PETERSON, Defendant - Appellee.	Bankr. No. 04-14855-EEB Adv. No. 04-01613-EEB Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before McFEELEY, Chief Judge, NUGENT, and McNIFF, Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

The law firm of Ross, Schroeder and Romatzke ("RSR") appeals a bankruptcy court judgment in favor of Karen K. Peterson ("Debtor"), the Chapter 7 Debtor, on its complaint objecting to the Debtor's discharge. For the reasons

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

stated, we affirm.

I. Background

The Debtor was formerly a client of RSR. The law firm represented her in divorce proceedings in 1997. In the divorce decree, the Debtor was awarded a pair of diamond earrings weighing 1 carat each, a 4-carat diamond ring, and necklace with a 2-carat diamond pendant. The items were collectively valued by the divorce court at $37,000.

The Debtor, again represented by RSR, appealed the divorce court's judgment. The attorney fees incurred for both matters totaled $12,500. The Debtor did not pay most of the fees owed.

On March 12, 2004, the Debtor filed a voluntary Chapter 7 petition. On her schedules, she listed the diamond earrings and valued them at $200. She did not schedule the ring or the necklace.

RSR filed a complaint objecting to the Debtor's discharge under 11 U.S.C. § 727(a)(4)(A) & (a)(5). At the trial, the Debtor testified that she listed the value of the earrings at $200 because one of them was chipped or flawed. *Trial Transcript* at 54-55, *in* Appellant's Appendix ("App.") at 74-75. She also stated that her bankruptcy lawyer had the earrings "looked at" in a pawn shop and by a silversmith. *Id.* at 54, *in* App. at 74. On that basis, he suggested the $200 value was appropriate. No other evidence of value for the earrings was introduced.

The Debtor also testified concerning the necklace and the ring. She stated that she gave the necklace to a friend in return for previous loans or gifts of funds totaling around $20,000. *Id.* at 56, *in* App. at 76. The testimony was corroborated by the recipient of the necklace. *Id.* at 89, *in* App. at 109.

The Debtor testified that the ring went missing around the time her fiancé passed away. *Id.* at 73, *in* App. at 93. She suspected it may have been taken in the days following his death from the residence she shared with him. The Debtor stated she did not report the possible theft to the police because she was

distraught during that time, the persons with access to her jewelry were her fiancé's family members, the jewelry was uninsured, and she was unsure if she had lost the ring or if it had been stolen. She claimed that other jewelry was also missing. *Id.* at 72-75, *in* App. at 92-95.

The bankruptcy court issued its March 20, 2007, Order finding the valuation of the earrings was not made with fraudulent intent; the Debtor's testimony regarding the ring was credible; and the explanation regarding the necklace was credible and corroborated. Order at 6, *in* App. at 137. The bankruptcy court ruled in the Debtor's favor on both claims for relief in the complaint, and this appeal followed.

II. Discussion

RSR timely appealed the bankruptcy court's final Order. Fed. R. Bankr. P. 8002(a). This Court has jurisdiction over this appeal because neither party has elected to have the appeal heard by the United States District Court for the District of Colorado. 28 U.S.C. § 158(b)(1) and (c)(1); Fed. R. Bankr. P. 8001(e).

Standard of Review

We review the bankruptcy court's findings of fact, including those regarding intent, under a clearly erroneous standard. *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1292 (10th Cir. 1997); Fed. R. Bankr. P. 8013. A finding of fact is clearly erroneous if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been committed. *Holaday v. Seay (In re Seay)*, 215 B.R. 780, 788 (10th Cir. BAP 1997) (internal quotation marks omitted). Review under the standard is significantly deferential. *Id*.

RSR argues the bankruptcy court should have denied the Debtor's discharge under both § 727 (a)(4)(A) and (a)(5).

Section 727(a)(4)(A)

Under § 727(a)(4)(A), a debtor is not discharged if the debtor "knowingly and fraudulently, in or in connection with the case" made a "false oath or account." RSR contends the Debtor's valuation of the earrings on her schedules was false and was made with fraudulent intent.

In order to deny a discharge under § 727(a)(4), the creditor must prove the debtor knowingly and fraudulently made an oath, and that the oath relates to a material fact. *In re Brown*, 108 F.3d at 1294. A debtor will not be denied a discharge if the false statement is due to mere mistake or inadvertence. *Id*.

The standard for determining when omissions from the schedules are knowing and fraudulent is set forth in the Tenth Circuit Court of Appeals decision of *In re Calder*, 907 F.2d 953, 955 (10th Cir. 1990). The false oath must relate to a material matter, that is, a matter that bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets or the existence or disposition of property. *Id*.

Material omissions and mischaracterizations must be made willfully with fraudulent intent. Intent is a question of fact. The court in *Calder* held that fraudulent intent may be deduced from the facts and circumstances of the case and inferred from the debtor's course of conduct. *Id*. at 956.

Here, the bankruptcy court found the Debtor had a reason for estimating the value of the earrings at $200. There was no evidence introduced at the trial that the earrings were of a higher value or of fraudulent motive. The bankruptcy court evaluated the Debtor's demeanor and testimony and believed her. The bankruptcy court's decision was not clearly erroneous, and this Court will not substitute its judgment for that of the trial court.

Section 727(a)(5)

RSR also contends it was error for the bankruptcy court to refuse to deny the Debtor's discharge under § 727(a)(5). That section provides: "The court

shall grant the debtor a discharge, unless . . . 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[.]"

A party objecting to a debtor's discharge under § 727(a)(5) has the burden of proving facts establishing that a loss or shrinkage of assets actually occurred. However, once the objecting party meets its initial burden of proof, the burden shifts to the debtor to explain the loss or deficiency of assets in a satisfactory manner. *Cadle Co. v. Stewart (In re Stewart)*, 263 B.R. 608, 618 (10th Cir. BAP 2001), *aff'd*, 35 F. App'x 811 (10th Cir. 2002).

In this case, the bankruptcy court concluded the Debtor's explanation for the disappearance of the diamond ring was credible. The Debtor explained her emotional state and the circumstances at the time the ring went missing, and explained the reason she did not pursue the matter further with the authorities or insurance. The record supports the bankruptcy court's determination.

The Debtor also explained the transfer of the necklace to her fiancé's mother. Her testimony was corroborated. The Court sees no error in the bankruptcy court's conclusions.

III. Conclusion

The bankruptcy court's findings were not clearly erroneous. The Order is affirmed.