FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
June 29, 2004
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE CLAIR DEAN DAVISON, doing business as Davison Rentals, doing business as Saco, doing business as Service Appliance Company, Inc., and RAYMA JOAN DAVISON, also known as Joan Davison, Debtors.	BAP No. KS-04-013
FIRST NATIONAL BANK, LARNED, Plaintiff – Appellee, v. CLAIR DEAN DAVISON, and RAYMA JOAN DAVISON, Defendants – Appellants, ERIC C. RAJALA, Trustee, Appellee.	Bankr. No. 01-23974-7 Adv. No. 02-6018 Chapter 7 ORDER AND JUDGMENT*

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

Before BOHANON, CORNISH, and BROWN, Bankruptcy Judges.

BOHANON, 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

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Debtor/Defendant-Appellants Clair Dean and Rayma Joan Davison (collectively, "Debtors") appeal a partial summary judgment entered by the United States Bankruptcy Court for the District of Kansas which sustained the Bank's objection to discharge based on 11 U.S.C. § 727(a)(4)(A).[1] Section 727(a)(4)(A) precludes a Chapter 7 discharge when a debtor knowingly and fraudulently makes a false oath that relates to a material fact. The Debtors argue that the bankruptcy court erred because there was a controverted issue of fact as to their intent in failing to include certain property interests in their financial schedules. For the reasons set forth below, we affirm.

I. Background

The Debtors were principals in Service Appliance Company, a retail electronics business ("Business"). On December 17, 2001, the Debtors filed for relief under Chapter 7 of the Bankruptcy Code. First National Bank, Larned ("Bank") was a creditor to whom they owed approximately $288,992.43 as a result of guarantees they made to the Bank on loans for the Business.

Prior to the time the Debtors filed for bankruptcy Mrs. Davison owned a 1/64th interest in an oil and gas well in Kay County, Oklahoma ("Oil and Gas Interest"). She also owned an undivided 1/3 interest in Oklahoma farmland slightly in excess of 100 acres ("Farmland"). The Farmland was sharecropped and Mrs. Davison received one-third of the landlord's interest in the crops. A few months before filing for bankruptcy, Mrs. Davison gave the Oil and Gas Interest to her mother and sold her interest in the Farmland to her sisters.

On March 18, 2002, the Bank filed a "Complaint to Determine

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[1] All future statutory references will be to Title 11 of the United States Code unless otherwise noted.

Dischargeability" alleging that the Debtors had not included in their schedules certain assets and prepetition transfers, namely the transfers of the Oil and Gas Interest and the Farmland. Subsequently, on March 28, 2003, the Bank filed a Motion for Summary Judgment ("Motion"), which sought denial of the Debtors' discharge under § 727(a)(2)(A) and (a)(4)(A).

The Debtors did not timely respond to the Bank's Motion and so filed a "Motion for Leave to Answer Plaintiff's Motion For Summary Judgment Out of Time" ("Leave to Answer") on May 7, 2003. Two days later, they filed "Defendant's Response to Motion for Summary Judgment" ("Response") and a "Memorandum in Support of Defendant's Response to Motion For Summary Judgment" ("Memo to Response"). After no objection from the Bank, the bankruptcy court granted the Debtors' Leave to Answer on June 2, 2003.

On August 18, 2003, the bankruptcy court entered an Order Granting Summary Judgment ("Order"). In the Order, the bankruptcy court denied summary judgment on the § 727(a)(2)(A) claim, determining that the Bank's evidence did not establish as a matter of law that the Debtors had made prepetition transfers with the intent to hinder, delay, or defraud creditors. However, on the § 727(a)(4)(A) claim the bankruptcy court granted the Bank summary judgment. The bankruptcy court concluded that because the Debtors admitted that they had the Oil and Gas Interest and the Farmland and had transferred both property interests just prior to bankruptcy, and because in their Response they offered no explanation for their failure to schedule the transfer of these property interests in their statement of financial affairs, which they had signed under penalty of perjury, there was no issue of material fact in dispute and summary judgment on the § 727(a)(4)(A) claim was appropriate. Although the § 727(a)(2)(A) claim remained at issue, because of the finding that the Debtors had violated § 727(a)(4)(A), the bankruptcy court concluded that the Debtors would not receive a discharge in their case, and a final judgment was entered.

On August 23, 2003, the Debtors filed a "Motion for Reconsideration of Order Granting Summary Judgment and Denying Discharge." On October 8, 2003, the bankruptcy court denied this motion. In November 2003, the attorney who had been representing the Debtors withdrew.

The Debtors missed the deadline for filing an appeal. After hiring another attorney, they filed a "Motion and Memorandum for Relief from Judgment under Fed. R. Civ. P. 60(d) or in the Alternative for Leave to File Appeal Out of Time Under Bankr. Rule 8002(c)(2)" ("Motion to Appeal Out of Time"). On December 17, 2003, the bankruptcy court granted the Debtors' Motion to Appeal Out of Time based on excusable neglect, and this appeal followed.

II. Appellate Jurisdiction

This Court has jurisdiction over this appeal. The bankruptcy court's judgment disposed of the adversary proceeding on the merits and is subject to appeal under 28 U.S.C. 158(a)(1). *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996). The Debtors received an extension of time within which to file their appeal pursuant to Bankruptcy Rule 8002(c)(2), and thereafter, timely filed this appeal. The parties have consented to this Court's jurisdiction by failing to elect to have the appeal heard by the United States District Court for the District of Kansas. 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1.

III. Discussion

The Bankruptcy Code provides for summary judgment through the Federal Rule of Bankruptcy Procedure 7056, which adopts the Federal Rule of Civil Procedure 56 ("Rule 56"). Fed. R. Bankr. P. 7056. Pursuant to Rule 56(c), summary judgment is appropriate when after consideration of the record, the court determines that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "By its very terms, this standard provides that the mere existence of some alleged

factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis deleted).

The party moving for summary judgment has the burden of establishing that summary judgment is appropriate. *Wolf v. Prudential Ins. Co. of Am.*, 50 F.3d 793, 796 (10th Cir. 1995). However, once the moving party has supported its motion, then it is incumbent upon the adverse party to show that there are material facts in dispute. Fed. R. Civ. P. 56(e). The adverse party may not rely solely on its pleadings but must "set forth specific facts showing that there is a genuine issue for trial." *Id.*

A bankruptcy court's grant of summary judgment is reviewed de novo. *Spears v. St. Paul Ins. Co. (In re Ben Kennedy & Assocs., Inc.)*, 40 F.3d 318, 319 (10th Cir. 1994). We evaluate the record in the light most favorable to the opposing party. *Phelps v. Hamilton*, 122 F.3d 1309, 1317-18 (10th Cir. 1997). If no genuine issue of material fact is in dispute, we must decide whether the bankruptcy court correctly applied the law. *Id*. at 1318.

Here the bankruptcy court determined that summary judgment was appropriate on the Bank's motion to deny discharge under § 727(a)(4)(A). To deny a debtor's discharge under § 727(a)(4)(A), a creditor must demonstrate by a preponderance of the evidence that the debtor knowingly and fraudulently made a false oath and that the oath relates to a material fact. *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1294 (10th Cir. 1997). An omission of assets from a Statement of Affairs or schedule may constitute a false oath under § 727(a)(4)(A). *Calder v. Job (In re Calder)*, 907 F.2d 953, 955 (10th Cir. 1990). Because it is undisputed that the Debtors made false statements under oath, what is at issue in this appeal is whether the bankruptcy court erred when it found that the Debtors made the oath knowingly and fraudulently about a material fact.

A debtor's intent is a question of fact. Intent may be established through showing that the Debtor made the statement with fraudulent intent or with reckless indifference to the truth. *Diorio v. Kreisler-Borg Constr. Co.*, 407 F.2d 1330, 1331 (2d Cir. 1969) (per curiam) (holding that behavior demonstrating a "reckless indifference to the truth . . . is the equivalent of fraud" for purposes of a prior version of § 727(a)(4)(A)). Knowing and fraudulent intent may be inferred through the facts and circumstances of a case. *Calder*, 907 F.2d at 956; *see also Sholdra v. Chilmark Financial LLP (In re Sholdra)*, 249 F.3d 380, 382 (5th Cir. 2001) (holding that circumstantial evidence can demonstrate a reckless indifference to the truth).

However, a false oath will not result in a denial of a discharge unless the subject matter of the oath is material. "The subject matter of a false oath is material and warrants a denial of discharge if it is related to the debtor's business transactions, or if it concerns the discovery of assets, business dealings, or the existence or disposition of the debtor's property." 6 Collier on Bankruptcy ¶727.04[1][b] at 727-40 (Alan N. Resnick, et al, eds, 15th ed. rev. 2003); *see also Calder*, 907 F.2d at 955.

In its Motion the Bank offered the following circumstantial evidence of the Debtors' knowing and fraudulent intent: (1) the Debtors never filed an amendment to correct their statement of financial affairs; (2) the Debtors did not voluntarily bring the omissions to anyone's attention before the Bank examined the Debtors for the second time under Rule 2004; (3) the Debtors waited until they were questioned about the omitted transfers before they admitted them; (4) the Debtors never explained why they failed to disclose the transfers in their statement of financial affairs.

The bankruptcy court found that the Bank's evidence established a reasonable inference of the Debtors' knowing and fraudulent intent. The bankruptcy court determined that the inference must be taken as true because the

Debtors gave no explanation for the two omissions in their financial statements nor did the Debtors deny that the omissions were made knowingly and fraudulently. Next, the bankruptcy court found that the omissions were material because the omitted information concerned the discovery of assets and the existence or disposition of property. The bankruptcy court concluded that the Debtors' discharge must be denied because as a matter of law all elements of § 727(a)(4)(A) had been established and there were no controverted issues of material fact.

On appeal the Debtors argue that the bankruptcy court erred when it found that summary judgment was appropriate because there was an issue of fact as to their intent in failing to include the transfers of the Oil and Gas Interest and the Farmland. First, the Debtors contend that the intent element was not established because the Bank did not produce any direct evidence involving the Debtors' state of mind with respect to the false oaths. They argue further that summary judgment is inappropriate when a choice must be made between two plausible inferences and that, in this case, there were two possible inferences.

As we have already observed, circumstantial evidence may establish intent under § 727(a)(4)(A). The bankruptcy court found that the Bank produced evidence supporting an inference of intent. Once the Bank produced such evidence, it became incumbent on the Debtors to rebut such evidence with facts indicating that intent was in dispute. In their Response, the Debtors produced no such evidence; the Debtors did not even deny that they had knowing and fraudulent intent.[2] Although the Debtors are correct that summary judgment is inappropriate when a choice must be made between two competing inferences,

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[2] We observe that pursuant to Rule 56(e), even a simple denial is not enough to show that an issue is controverted. Once a fact issue has been established by the moving party, the adverse party must go beyond the pleadings to show that it is controverted. Fed. R. Civ. P. 56(e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

see, e.g., Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 764 (1st Cir. 1994), the Debtors did not show that there was any other inference to be drawn from the facts in evidence. In the absence of any other evidence, the bankruptcy court could only conclude that the element of intent under § 727(a)(4)(A), as presented by the Bank, was uncontroverted.

Next, the Debtors attack each of the four factors that the bankruptcy court found supported the inference of knowing and fraudulent intent. The Debtors dispute each of these elements with proffers of testimony the Debtors would have given had there been a hearing.[3] Such evidence is irrelevant here. As an appellate court, we may consider only the evidence that was actually before the bankruptcy court. *See, e.g., Vitkus v. Beatrice Co.,* 127 F.3d 936, 946 (10th Cir. 1997) (finding that as a general rule federal appellate courts will not consider an issue not passed on below because "appellate review of issues not raised before the [trial] court would waste judicial resources and undermine the need for finality in judgments by requiring us often to remand cases for additional fact finding.").

Finally, the Debtors argue that the bankruptcy court contradicted itself when it found no evidence of fraudulent intent under § 727(a)(2)(A), yet found evidence of knowing and fraudulent intent under § 727(a)(4)(A). We disagree. In pertinent part, under § 727(a)(2)(A) a debtor's discharge will be denied if a bankruptcy court finds that the debtor transfers property "with intent to hinder, delay, or defraud a creditor." 11 U.S.C. § 727(a)(2)(A). The intent element in

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[3] In their Brief the Debtors emphasize that they prepared their schedules under the advice of their first attorney and that it was their attorney who guided them through the bankruptcy process. Although we have questions about the Debtors' former attorney's conduct throughout these proceedings, this issue was not presented to the bankruptcy court and we cannot address it here. Moreover, an attorney's negligence, even if properly presented, will not necessarily rebut a finding of intent. "[T]he advice of counsel is not a defense when it is transparently plain that the property should be scheduled." *Hibernia Nat'l Bank v. Perez*, 124 B.R. 704, 710 (E. D. La. 1991) (internal quotation omitted).

§ 727(a)(2)(A) focuses on a debtor's *transfer* of property in order to hinder, delay or defraud a creditor whereas the intent element in § 727(a)(4)(A) focuses on whether a debtor knowingly and fraudulently *made a false oath*. In analyzing the intent elements of the two statutes, the bankruptcy court did not examine the same behavior.

IV. Conclusion

For the reasons set forth above, we AFFIRM the bankruptcy court.