UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
GEORGE PETER PROTOS	)	CASE NO. 02-74770-MHM
	)	
Debtor	)	
	)	
GARY A. SILVER	)	
	)	
Plaintiff	)	
v.	)	**ADVERSARY PROCEEDING NO. 03-6473**
	)	
GEORGE PETER PROTOS	)	
	)	
Defendant	)	

AMENDED ORDER

This adversary proceeding is before the court on Plaintiff's motion for summary judgment. Plaintiff initiated this adversary proceeding pursuant to 11 U.S.C. § 727 to deny the discharge of Debtor. Plaintiff asserts his claim against Debtor arises from a lawsuit initiated against Debtor in 1999 in the State Court of Fulton County. The lawsuit was ultimately referred to and decided in arbitration in 2002 in favor of Plaintiff. On December 13, 2002, the arbitration Special Master's Final Amended Decision was filed with the State Court of Fulton County, and on December 16, 2002, a state court judge entered judgment against Debtor in the amount of $356,503.35 (the "Arbitration Award"). Also on December 16, 2002, Debtor filed a Chapter 7 bankruptcy petition. On December 30, 2002, Plaintiff filed a Proof of Claim in Debtor's bankruptcy case.

In the motion for summary judgment, Plaintiff alleges that Debtor should be denied a discharge under 11 U.S.C. §§ 727(a)(2), (a)(3), (a)(4), and (a)(5) because Debtor transferred or concealed property; failed to disclose financial information and failed to preserve financial records; made false oaths and withheld financial records; and failed to explain satisfactorily a loss of assets. In his response, Debtor denies Plaintiff's allegations. Debtor also argues that Plaintiff is not a creditor of Debtor and therefore does not have standing to bring assert an objection to discharge. This court has jurisdiction over the claims pursuant to 28 U.S.C. §§ 157 and 1334. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (J), and (O). For the reasons set forth below, Plaintiff's motion should be granted.

Statement of Facts

Debtor filed a voluntary petition for relief under Chapter 7 December 16, 2002. Debtor filed verified Schedules and the Statement of Financial Affairs December 31, 2002.[1]

Prior to filing his bankruptcy petition, Debtor was engaged in the real estate development business and built homes and developed subdivisions in the greater Atlanta area through at least two corporations, Protos Properties, Inc. ("PPI"), and Distinctive Builders, Inc. ("DBI"). Debtor served as president and principal of both PPI and DBI. Debtor was also listed as registered agent, CEO, CFO, and secretary of a third corporation, Portman-Protos Development Corporation, from April 3, 2001, through February 26, 2003.

In his capacity as principal of both PPI and DBI, Debtor conducted banking business with First Capital Bank, the primary lender for the acquisition, development, and construction of the

[1] Bankruptcy Rule 1007 requires a debtor to file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs (the "Schedules"). If those Schedules are not filed with the petition, they must be filed within 15 days thereafter.

homes and subdivisions constructed by Debtor. As president of both PPI and DBI, Debtor executed notes and deeds to secure debt on real property in favor of First Capital Bank. Debtor also executed numerous personal guarantees of the corporate loans during the business relationship with the bank. Included in the several personal guarantees for each loan renewal signed by Debtor was a personal guarantee to First Capital Bank signed postpetition in February 2003. The loans were renewed both prepetition and, as late as February of 2003, postpetition. In connection with the loan and loan renewal transactions, on numerous occasions Debtor provided First Capital Bank personal financial statements, including one issued June 30, 2002, less than six months before this case was filed.

Debtor did not, however, list First Capital Bank as a creditor in his Schedules. Debtor failed to produce any of the loan documents with First Capital Bank, including notes, renewals, guarantees, and personal financial statements presented to the bank in connection with the loans, as directed by an order entered February 10, 2003, which required document production at a Rule 2004 Examination by Plaintiff. During the March 7, 2003, Rule 2004 Examination, Debtor denied under oath knowing the name of the lender and denied knowing whether the loans were guaranteed. When Plaintiff's counsel identified First Capital Bank as the lender, Debtor then admitted the name of the lender. In Statement of Financial Affairs ("SFA") item number 19(d) requiring Debtor to disclose a "List of all financial institutions, creditors, and other parties...to whom a financial statement was issued within two years immediately preceding the commencement of this case by debtor," Debtor checked "None."

On or about April 3, 2001, Debtor filed an annual registration for the Portman-Protos Development Corporation with the Secretary of State of Georgia, and renewed that registration each year thereafter until the annual registration filed postpetition on February, 26, 2003. The

records of the Secretary of State of Georgia show that until the annual registration filed February 26, 2003, Debtor was the registered agent, CEO, CFO, and secretary of the company.

The instructions in SFA item number 18 require a debtor to list the "names...beginning and ending dates of *all* businesses in which the debtor was an officer, director, partner, or managing executive of a corporation...within the past six years..." Debtor failed in SFA item number 18 to disclose his interest in Portman-Protos Development Corporation. Debtor asserts he did not list Portman-Protos Development Corporation in the SFA because the company never conducted any business, and was a mere "shell" corporation.

At the time Debtor's bankruptcy petition was filed, he was engaged in litigation in the case of *Landmark America Inc. v. George Protos, et. al.*, Stark County Court of Common Pleas, Case No. 86-202, in the State of Ohio. On September 30, 2002, three months before filing for bankruptcy, Debtor filed a motion for relief from judgment in that case. On February 3, 2003, less than two months postpetition, Debtor filed a "Notice of Bankruptcy Filing" in the Stark County Court, and on February 6, 2003, a Stark County judge denied Debtor's motion for relief from judgment. The instructions for the SFA item number 4 requires a listing of all proceedings in which Debtor was a party within one year of filing the bankruptcy petition. Debtor failed in SFA item number 4 to disclose the pending litigation in Stark County.

During 2002, Debtor deposited into a Wachovia Bank (f/k/a First Union) account and its incorporated Evergreen Money Market account $8,200.00, withdrew $4,073.54, and wrote checks and made other withdrawals in the amount of $22,505.73. Debtor failed to disclose that account in Schedule B, *Personal Property*, and SFA item number 11, *Closed Financial Accounts*. Debtor maintains that the failure to disclose was a mere oversight, and that the low ending balance is a "satisfactory explanation as required by the courts."

On November 20, 2002, less than one month before the bankruptcy case was filed, Debtor executed and recorded a Deed to Secure Debt to Debtor's residence in favor of his nonbankruptcy counsel, Weinstock & Scavo, P.C.. Debtor failed to disclose this transfer in the SFA item number 10 and failed to list the law firm's interest in Schedule D. Instead, Debtor listed Weinstock & Scavo, P.C., in Schedule F as a creditor having an unsecured claim of $204,230.39 for legal fees incurred in 2002. Debtor's Schedule D shows the fair market value of Debtor's residence was $1.4 million, and shows liens held by Alliance Mortgage Company and Wachovia Bank totaling $848,345.42. The Trustee ultimately abandoned the property.

On June 24, 2002, as president and owner of DBI, Debtor executed a warranty deed transferring real property consisting of a house and acreage in Blue Ridge, Georgia, to Debtor's former spouse. The warranty deed, however, was not recorded until November 26, 2002, less than one month before Debtor filed for bankruptcy. Debtor failed to disclose the transfer of the real estate in items number 7 ("Gifts"), 10 ("Other Transfers"), or 14 (Property held for another person") of the SFA.

DISCUSSION AND CONCLUSIONS OF LAW

Summary Judgment Standards

Pursuant to FRCP 56(c), incorporated in Bankruptcy Rule 7056, a party moving for summary judgment is entitled to prevail if no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. The burden of proof is on the moving party to establish that a genuine issue of material fact is absent. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970); *Clark v. Coats & Clark, Inc.,* 929 F. 2d 604 (11th Cir. 1991). Evidence is to be construed in the light most favorable to the nonmoving party. *Id.; Rollins v. TechSouth, Inc.,* 833 F. 2d 1525 (11th Cir. 1987).

If the evidence from the nonmoving party is merely colorable or is not significantly probative, summary judgment may not be granted. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1985). Where contradictory inferences may be drawn from undisputed evidentiary facts, summary judgment is usually inappropriate. *Nunez v. Superior Oil Co.,* 572 F. 2d 1119 (5th Cir. 1978);[2] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). If facts to support a particular inference are completely absent, however, or if the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable minds could arrive at but one verdict, summary judgment is appropriate. *Nunez,* at 1124. A motion for summary judgment cannot be denied merely because issues of motive or intent are involved. When a rational trier of fact could not find for the nonmoving party based on the record as a whole, summary judgment is

[2] *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), renders decisions of the Fifth Circuit issued prior to September 30, 1981, binding precedent for the Eleventh Circuit.

appropriate. *Morgan v. Harris Trust & Savings Bank of Chicago,* 867 F. 2d 1023 (7th Cir. 1989). Although motive or intent is usually not susceptible to resolution on motion for summary judgment, such a motion will be granted if no evidence or reasonable inference from the evidence supports the nonmoving party's claims or allegations of motive and intent. *Richards v. Nielsen Freight Lines,* 602 F. Supp. 1224 (D.C. Cal. 1985).

Where the judge is also the ultimate trier of fact, and where a trial would not enhance the court's ability to draw inferences and conclusions from undisputed facts, the court is free to draw such inferences and conclusions within the context of a motion for summary judgment. *Wick v. Tucson Newspaper, Inc.,* 598 F. Supp. 1155 (D. Ariz. 1985); *Nunez v. Superior Oil Co.,* 572 F. 2d 1119 (5th Cir. 1978).[3] The court may not, however weigh conflicting evidence to resolve factual disputes; if a genuine issue of material fact is found, summary judgment must be denied. *Ryder International Corporation v. First American National Bank,* 943 F. 2d 1521 (11th Cir. 1991).

Standing

Debtor argues that the Arbitration Award is invalid and, as a result, Plaintiff does not have a valid claim against Debtor and should not be considered a creditor as defined under the Bankruptcy Code, and thus does not have standing pursuant to 11 U.S.C. § 727 to bring this action. In response Plaintiff alleges that the Arbitration Award is valid and that Debtor's challenge to liability is solely to deny Plaintiff's standing to object to discharge in the adversary proceeding.

[3] *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), renders decisions of the Fifth Circuit issued prior to September 30, 1981, binding precedent for the Eleventh Circuit.

Debtor contends that the Arbitration Award is invalid because it was arbitrary and capricious. Debtor argues that an Arbitration Award can be vacated if it was arbitrary and capricious, citing *Lifecare Int'l, Inc. v. CD Medical, Inc.*, 68 F.3d 429, 433 (11th Cir. 1995), *modified by* 85 F.3d 519 (1996). Debtor's argument, however, is flawed. The *Lifecare* case was filed in the U.S. District Court, and the controlling law was the *Federal Arbitration Act*, which applies different standards than the Georgia law that controls in the present case. The Georgia Arbitration Code, O.C.G.A. § 9-9-13,[4] provides the exclusive grounds for vacating an arbitration award in Georgia. *Greene v. Hundley*, 266 Ga. 592, 468 S.E.2d 350 (1996); *Marchelletta v. Seavy Construction Services, Inc.*, 2004 WL 26729 (Ga.App. January 6, 2004). A finding that an arbitration decision was arbitrary and capricious is not a ground for vacating an arbitration award under Georgia law. Therefore, Debtor's argument based on *Lifecare* lacks merit.

---

[4] O.C.G.A. 9-9-13 provides:

(a) An application to vacate an award shall be made to the court within three months after delivery of a copy of the award to the applicant.

(b) The award shall be vacated on the application of a party who either participated in the arbitration or was served with a demand for arbitration if the court finds that the rights of that party were prejudiced by:

(1) Corruption, fraud, or misconduct in procuring the award;
(2) Partiality of an arbitrator appointed as a neutral;
(3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made;
(4) A failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection; or
(5) The arbitrator's manifest disregard of the law....

(d) The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award....

Additionally, the Arbitration Award arose from a binding *consent* order to which Debtor was a party and which was entered by the State Court.[5] On June 6, 2002, State Court of Fulton County entered a consent order, prepared by Debtor's nonbankruptcy counsel, with the arbitration provision by which the parties agreed to abide. The state court order stated, in part:

> 5. The finding of the Special Master shall be final, non-appealable, and shall be the judgment of the State Court.
>
> 6. The parties have agreed, and the Court hereby Orders that any rights of appeal or reconsideration are hereby waived by the parties. The finding of the Special Master shall be binding upon the parties.

Where the parties agree to arbitration, the arbitration decision, if within the scope of the agreement, "may only be attacked for fraud, or such gross mistake as would necessarily imply bad faith or the failure to exercise an honest judgment." *Locklear v. Payne,* 124 Ga. App. 845, 186 S.E. 2d 439 (1971). Debtor has not alleged fraud or mistake, nor any cause described in O.C.G.A. 9-9-13. The Arbitration Award is a binding decision upon the parties and is entitled to preclusive effect in this adversary proceeding pursuant to the principles of full faith and credit set forth in 28 U.S.C. § 1738. *See also In re Selmonosky*, 204 B.R. 820 (Bankr.N.D.Ga. 1996). The Arbitration Award is final and will not be vacated.

Section 727(c)(1) of the Bankruptcy Code permits a creditor to object to the granting of a discharge under subsection (a) of 11 U.S.C. § 727. A "creditor" is defined under 11 U.S.C. § 101(10) as an "entity that has a claim that arose against the debtor *at the time of or before* the order for relief concerning the debtor." A "claim" is defined by 11 U.S.C. § 101(5) as a "right to

---

[5] Debtor was represented by counsel in the state court proceeding, including the arbitration.

payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

The Arbitration Award constitutes a right to payment and was entered prepetition. Therefore Plaintiff is a creditor in this case because he has a claim that arose "at the time of or before the order for relief concerning the debtor." In accordance with Bankruptcy Rule 3001,[6] Plaintiff filed his proof of claim December 30, 2002. Debtor has not filed an objection to Plaintiff's proof of claim. Debtor lists Plaintiff as a creditor in Schedule F, "Creditors Holding Unsecured Nonpriority Claims." Plaintiff is a creditor and has standing to bring this action objecting to the discharge of Debtor's debts.

Objections to Discharge

Plaintiff seeks to have Debtor's discharge denied pursuant to 11 U.S.C. §§ 727(a)(2), (a)(3), and (a)(4):

> (a) The court shall grant the debtor a discharge, unless...
>
> (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
>
> (B) property of the estate, after the date of the filing of the petition;

[6]Pursuant to Rule 3001(f), a proof of claim filed in accordance with [the Bankruptcy Rules] shall constitute *prima facie* evidence of the validity and amount of the claim.

(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;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

11 U.S.C. § 727.

The party objecting to the discharge bears the burden of establishing grounds for denial of discharge. Fed.R.Bankr.P. 4005. A finding against Debtor under any one of the four provisions relied upon by Plaintiff is sufficient to deny Debtor a discharge. Section 727 codifies a fundamental policy of the Bankruptcy Code -- that only honest, unfortunate debtors are entitled to receive a discharge, and thus the benefit of a fresh start. A plaintiff bears the initial burden of proving, by a preponderance of the evidence, that a debtor's discharge should be denied. *See Grogan v. Garner,* 498 U.S. 279, 285-91, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); *Hawley v. Cement Indus., Inc.,* 51 F.3d 246, 249 (11th Cir.1995); *Chalik v. Moorefield,* 748 F.2d 616, 619 (11th Cir.1984); *Manhattan Leasing Sys., Inc. v. Goblick,* 93 B.R. 771, 775 (Bankr. M.D. Fla. 1988). Once a plaintiff meets that initial burden, however, the

debtor has the ultimate burden of persuasion. *See id.* The debtor must present "enough credible evidence to dissuade the court from exercising its discretion to deny the debtor's discharge based on the evidence presented by the objecting party." *Law Offices of Dominic J. Salfi, P.A. v. Prevatt,* 261 B.R. 54, 58 (Bankr. M.D. Fla. 2000).

Fraudulent Transfer or Concealment of Assets 11 U.S.C. § 727(a)(2)

While a finding of actual intent to defraud creditors is required to support a conclusion to deny a discharge under 11 U.S.C. § 727(a)(2), actual fraudulent intent may be established by circumstantial evidence and by inferences drawn from a course of conduct. *Matter of Reed*, 700 F.2d 986, 991 (5th Cir. 1983). Thus, an objection to discharge may be sustained under § 727(a)(2) if the plaintiff proves: (1) a transfer of property; (2) belonging to the debtor; (3) within one year before the filing of the petition; and (4) with the intent to hinder, delay, or defraud a creditor or officer of the estate. *In re Meany,* 2000 WL 666378, at 3 (E.D.La. 2000) [only Westlaw citation available], *citing In re Chastant,* 873 F.2d 89, 90 (5th Cir.1989). Facts which reveal the debtor has converted assets to shield them from creditors will result in a denial of discharge. *Matter of Reed,* 700 F.2d 986 at 991.

Debtor executed and recorded a Deed to Secure Debt in favor of his nonbankruptcy counsel Weinstock & Scavo, P.C., on November 20, 2002, less than one month before the bankruptcy case was filed. This event constitutes the first three elements for a claim under §727(a)(2). The fourth element is shown by Debtor's conduct following the transfer. Debtor failed to disclose this transfer in the SFA. Debtor failed to list the law firm's interest in Schedule D. Debtor instead listed Weinstock & Scavo, P.C., on Schedule F as a creditor with

an *unsecured* claim. Further, while Debtor disclosed liens, not unexpected for a debtor, against the property in favor of Alliance Mortgage Company and Wachovia Bank in the amount of $848,345.42, Debtor omitted the further encumbrance granted to his nonbankruptcy attorneys. These facts support an inference that Debtor intentionally concealed the transfer from the Trustee and other creditors to ensure that Weinstock & Scavo, P.C., could collect its fee and to protect the law firm from litigation to avoid the lien as a fraudulent transfer. Debtor argues that the transfer was worthless, and as a result, irrelevant, because the Trustee ultimately abandoned an interest in the property attached to the deed. To the contrary, the Trustee could have pursued avoidance of the transfer as a preference or fraudulent conveyance and recouped the equity for the benefit of the estate's creditors, including the law firm.

A debtor fraudulently conceals property when he knowingly withholds information or property or knowingly acts for the purpose of preventing the discovery of such property, intending to deceive or cheat a creditor, a trustee, a custodian, or a bankruptcy judge. *U.S. v. Thayer*, 201 F.3d 214, 224 (3d. Cir. 1999). The lack of value does not excuse the debtor from the act of initially concealing the transfer. *Id.* ("The act of concealment does not depend on the amount or value of the property involved.") Thus, Plaintiff has proven by a preponderance of evidence the elements required for the application of 727(a)(2)(A).

Failure to Produce Financial Records 11 U.S.C. § 727(a)(3)

A debtor's 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. Section 727(a)(3) requires as a precondition to discharge that debtors produce records "which provide creditors with enough information to ascertain the debtor's financial condition and track his financial dealings with substantial accuracy for a reasonable period past to present." *In re Juzwiak,* 89 F.3d 424, 427 (7th Cir.1996) (*quoting In re Martin,* 141 B.R. 986, 995 (Bankr.N.D.Ill.1992)). The purpose of the section is to give the trustee and creditors full and accurate information regarding the status of the debtor's financial affairs and history, to permit testing of the completeness of the debtor's disclosures in the Schedules and at the §341 meeting of creditors. *See Meridian Bank v. Alten,* 958 F.2d 1226, 1230 (3d Cir.1992). "[C]ourts and creditors should not be required to speculate as to the financial history or condition of the debtor, nor should they be compelled to reconstruct the debtor's affairs." *In re Juzwiak,* 89 F.3d at 428.

The debtor must fully disclose all information relevant to the administration of the bankruptcy case. *Kentile Floors, Inc. v. Winham,* 440 F.2d 1128 (9th Cir. 1971); *In the Matter of Garman,* 643 F.2d 1252 (7th Cir. 1980). *See In re Robinson,* 292 B.R. 599 (Bankr.D.Ohio 2003); *Woolman v. Wallace* (*In re Wallace*), 289 B.R. 428 (Bankr.N.D.Okla. 2003); *Fleet Securities, Inc. v. Vina* (*In re Vina*), 283 B.R. 803 (Bankr.M.D.Fla. 2002); *In re Firrone,* 272

B.R. 213 (Bankr.N.D.Ill. 2000); *In re Riccardo,* 248 B.R. 717 (Bankr.S.D.N.Y. 2000). "It is not for the debtor to decide what is and is not relevant. A debtor who omits important information and fail[s] to make full disclosure, place[s] the right to the discharge in serious jeopardy." *Jensen v. Brooks* (*In re Brooks*), 278 B.R. 563, 566 (Bankr.M.D.Fla. 2002). "Creditors are entitled to judge for themselves what will benefit, and what will prejudice, them" and the estate. *In re Chalik,* 748 F.2d 616, 618 (11th Cir. 1984).

To construct a *prima facie* case under § 727(a)(3), a creditor objecting to discharge must show (1) that the debtor failed to provide, maintain, and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions. *See Meridian Bank,* 958 F .2d at 1232. If the creditor satisfies his burden on these two factors, the debtor has the burden to prove that his failure to keep adequate records was justified under the circumstances. *See In re Cox,* 41 F.3d 1294, 1297 (9th Cir.1994); *In re Grisham,* 245 B.R. 65, 75 (Bankr.N.D. Tex 2000). The adequacy of a debtor's records should be determined on a case by case basis. *In re Trogdon*, 111 B.R. 655, 658 (Bankr.N.D.Ohio 1990). Relevant considerations include debtor's occupation, financial structure, education, experience, sophistication, and any other circumstances that should be considered in the interest of justice. *Id.*

Debtor was a businessman engaged in the development of homes and subdivisions and was principal of at least two corporations. In that capacity, Debtor conducted considerable business with financial institutions. Accordingly, Debtor has the requisite amount of experience and sophistication to preserve his records from which his financial condition or business transactions may be ascertained. Nevertheless, Debtor repeatedly failed to disclose

pertinent financial information in the Schedules and failed to produce financial documents when directed to do so. Debtor failed to produce any of the loan documentation with First Capital Bank, including notes, renewals, guarantees, and personal financial statements presented to the bank in connection with the loans; Debtor failed to disclose the bank account history at Wachovia; Debtor failed to disclose the pending litigation in the case of *Landmark America Inc. v. George Protos, et. al.*, in the Stark County Court; and Debtor failed to disclose the transfer of the real property located in Blue Ridge, Georgia, to his ex-wife. As a result of these acts of concealment, Debtor failed to provide creditors with information sufficient to ascertain his financial condition and track his financial dealings with substantial accuracy for a reasonable period, and failed to provide the trustee and creditors with full and accurate information regarding the status of his financial affairs and history. Such information is necessary for a trustee and creditors to test the completeness of the debtor's financial disclosure. Plaintiff has met the two-factor burden set forth in *Meridian Bank*.

Debtor argues that his failures to disclose were not acts of concealment but mere oversights, unfortunate mistakes, and misclassifications. The amount, pattern, and materiality of Debtor's false oaths and failures to provide financial records regarding his business endeavors, in conjunction with information omitted from the Schedules and Statement of Financial Affairs, support the conclusion that Debtor's conduct was not justified under the circumstances. Therefore, Plaintiff is entitled to prevail under § 727(a)(3).

False Oath - 11 U.S.C. § 727(a)(4)

The petition, schedules, and statement of financial affairs are executed *under oath* and penalty of perjury. Fed. R. Bankr.P. 1008; Official Form 1 (Voluntary Petition); Official Form 7 (Statement of Financial Affairs). *See Hamo v. Wilson* (*In re Hamo*), 233 B.R. 718, 725 (6th Cir. BAP 1999); *Beaubouef v. Beaubouef* (*In re Beaubouef*), 966 F.2d 174, 178 (5th Cir. 1992). Moreover, a debtor testifies at the meeting of creditors under oath. 11 U.S.C. § 343; Fed. R. Bankr.P. 2003(c).

To prove that a debtor knowingly and fraudulently made a false oath or account, a creditor must show that (1) the debtor made the statement under oath; (2) the statement under oath was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement was materially related to the bankruptcy case. *Matter of Beaubouef*, 966 F.2d 174, 177-78 (5th Cir. 1992). The "false oath" discharge exception of 11 U.S.C. § 727(a)(4) is designed to ensure that complete, truthful, and reliable information is put forward at the outset of the proceedings so that decisions can be made by parties in interest based on fact rather than fiction. *In re Matus*, 303 B.R. 660 (Bankr.N.D.Ga. 2004). The Court of Appeals for the Eleventh Circuit has observed, "The veracity of the bankrupt's statements is essential to the successful administration of the Bankruptcy Act." *In re Chalik,* 748 F.2d 616, 618 (11th Cir. 1984); *accord In re Robinson,* 292 B.R. 599, 607-08 (Bankr.S.D.Ohio 2003) (debtor's disclosure obligations are part of the price paid for receiving a discharge) (quoting *In re Colvin,* 288 B.R. 477, 481 (Bankr.E.D.Mich.2003) and citing *Roudebush v. Sharp* (*In re Sharp*), 244 B.R. 889, 892 (Bankr.E.D.Mich.2000) (obligation to file complete and accurate schedules is crucial to the fair administration of the case); *In re Hyde,* 222 B.R. 214, 219 (Bankr.S.D.N.Y.1998) (full disclosure is crucial to the integrity of the bankruptcy process); *In re Hogan,* 214 B.R. 882, 886 (Bankr.E.D.Ark.1997) (the bankruptcy

system depends on the debtor's honesty); *United States v. Haught* (*In re Haught*), 207 B.R. 269, 271 (Bankr.M.D.Fla.1997) (veracity of the debtor is vital for the effective administration of the estate)). Deliberate omissions from schedules or the statement of financial affairs may also constitute false oaths or accounts. *Chalik,* 748 F.2d at 618. Like misrepresentations, the omission must be (i) made knowingly and with fraudulent intent, and (ii) material to the bankruptcy case at issue. *Caldwell v. Horton* (*In re Horton*), 252 B.R. 245, 248 (Bankr.S.D.Ga.2000).

Plaintiff asserts that a number of omissions and misrepresentations in the Schedules constitute material omissions and false oaths or accounts. Plaintiff presented evidence that Debtor omitted or misrepresented several items for the sole purpose of obscuring the assets of the estate. For example, Debtor did not list Portman-Protos Development Corporation in his SFA item number 18 despite the fact that from the annual registration dated April 3, 2001, until the annual registration filed postpetition February, 26, 2003, Debtor was the registered agent, CEO, CFO, and secretary of the company. Not only did Debtor conceal this information from the SFA, but Debtor's testimony during the Rule 2004 Examination on the issue was evasive and unconvincing.

> Q: Why is Pamela Protos the registered agent for Portman-Protos Development Corporation?
>
> A: I don't know.
>
> Q: Do you know when she became registered agent?
>
> A: I know that the corporation never did any business, that whoever filed it was paid to file it and I don't believe Jeff Portman has any interest in that corporation at all.

Q: I just want to know how Pam Protos became the CEO and secretary.

A: I don't know, you'd have to ask her.

Q: Was she always the CEO and secretary?

A: I don't know.

Q: And you don't know who was the CEO and secretary before Pamela Protos?

A: I know that if it was filed I probably was. Nothing was ever with that corporation. It's a shell, nothing was ever done with it.

Q: The question is do you know who was the CEO and secretary before Pamela Protos?

A: No.

Debtor completed and filed his Schedules under penalty of perjury and was under oath during the Rule 2004 Examination. The statements made in the Rule 2004 examination were materially related to the bankruptcy case. The records regarding Portman-Protos Development Corporation support the inference that Debtor knew the answers he gave were false. Even if the corporation existed in name only and was never used in business, as Debtor alleges, Debtor was nevertheless not privileged to fail to heed the instructions of the SFA item number 18 which required disclosure of all businesses in which Debtor was an officer in the past six years.

During the March 7, 2003, Rule 2004 Examination, Debtor also testified that he did not know the name of the lender (First Capital Bank) connected with the acquisition, development, and construction loans of DBI and PPI. Debtor testified that he did not know the guarantor of those loans. When confronted with documents showing the transactions with First Capital

Bank, however, Debtor testified that he guaranteed the loans only at their inception two years prior. The documents showed, however, that Debtor executed guarantees *postpetition*, as recently as one month before the Rule 2004 Examination. Debtor also failed to disclose First Capital Bank in SFA item number 19, "List of all financial institutions, creditors, and other parties...to whom a financial statement was issued within two years immediately preceding the commencement of this case by debtor." Debtor issued a financial statement to First Capital Bank June 30, 2002.

Debtor's Schedules were filed under penalty of perjury and Debtor was under Oath during the Rule 2004 Examination. Debtor's Schedules are littered with material omissions and inaccuracies and at Debtor's testimony at Rule 2004 examination, Debtor attempted to continue a pattern of avoiding disclosure of complete and accurate information. The evidence supports a conclusion that Debtor knew the answers he gave were false and were made with the intent to deceive.

CONCLUSION

The evidence demonstrates that Debtor failed to disclose bank account information, financial transactions, pending lawsuits, transfers of property, and Debtor's ownership of a business. The numerous significant omissions and inaccuracies show a pervasive pattern warranting the conclusion that they were not the result of mistake or oversight. These omissions and inaccuracies were the result of an intent to deceive creditors, the Trustee, and the court. Plaintiff has shown conduct by Debtor that supports a denial of his discharge pursuant to 11 U.S.C. §§ 727(a)(2), (3), and (4). Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is granted. Debtor's discharge is denied.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor, Debtor's attorney, Plaintiff's attorney, the Chapter 7 Trustee, and all creditors and parties in interest.

IT IS SO ORDERED, this the 10th day of September, 2004.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE