UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	CASE NUMBERS
ARNOLD ELIOT TARAS,	03-98427-MGD
Debtor,	
THE CADLE COMPANY,	ADVERSARY CASE NO. 04-6240
Plaintiff,	
vs.	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
ARNOLD E. TARAS,	
Defendant.	

ORDER DENYING DEBTOR'S DISCHARGE

On June 1, 2004, The Cadle Company ("Plaintiff" or "Cadle") filed a Complaint objecting to the discharge of Arnold E. Taras ("Debtor" or "Defendant") pursuant to 11 U.S.C. § 727(a)(2) and § 727(a)(4).[1] Defendant, who is proceeding *pro se* in this adversary proceeding and in his chapter 7 case, timely filed an answer on June 15, 2005. At the completion of discovery and after entry of a Pre-Trial Order, a trial was held before the undersigned on June 20, 2005. At the conclusion of the evidence and after hearing argument from the parties, the Court took the matter under advisement. It is undisputed that the Court has jurisdiction over this case and over the parties pursuant to 28 U.S.C. §§ 157(b) and 1334. This proceeding

[1]Plaintiff's complaint does not specifically reference § 727(a)(4), but Count II clearly alleges a cause of action under the section. Moreover, § 727(a)(4) is specifically referenced in the consolidated Pre-Trial Order which serves to supersede the prior pleadings in the case.

constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(J). This opinion constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the FEDERAL RULES OF BANKRUPTCY PROCEDURE. A separate judgment will be entered pursuant to Bankruptcy Rule 9021.

FINDINGS OF FACT

Debtor is a sixty-nine year old man who suffers from Parkinson's disease. He is a management consultant who operates his business through a limited liability company of which he is the sole member. The business has been struggling for a number of years and Debtor's earnings from the business are extremely limited. Debtor receives most of his income from social security. Plaintiff is a judgment creditor of Debtor by virtue of being the successor-in-interest to Bobby D. Associates, which filed suit against Debtor for non-payment of a credit card obligation and obtained a judgment in August 2001. Debtor was convicted of a felony related to filing erroneous tax returns and served a criminal sentence of one year and one day at the Atlanta Federal Prison between September 1999 and August 2000, conditioned upon his spending five months at a halfway house.

Plaintiff recorded its judgment lien on the general execution docket of Cobb County, thereby creating a lien on Debtor's residence. The Internal Revenue Service subsequently also filed a tax lien against Debtor's residence.

On August 5, 2003, Debtor filed a Chapter 7 case in this court. Debtor filed the case *pro se* . Debtor is not licensed to practice law and relied on a self-help book published by Nolo which contained advice and forms for assistance in filing his bankruptcy case. Debtor also spoke with several friends of his who are attorneys, but who did not represent him in the case and whom Debtor could not specifically identify in his testimony.

Debtor's Statement of Financial Affairs and Schedules appear to have been meticulously prepared. They were marked and admitted as Joint Exhibit 5. For example, in response to Question 2 of the Statement of Financial Affairs, "Income other than from

employment or operation of business," Debtor listed loans from life insurance policies, social security, dividends and proceeds from the sale of stocks, each in a specific dollar amount. Schedule B which lists Personal Property is similarly detailed with respect to: account numbers for checking accounts, description of specific household goods and life insurance policy numbers. Indeed, the particularity with which Debtor has completed his schedules exceeds that of many cases where debtors are represented by counsel.

However, nowhere in the schedules and statements did the Debtor disclose his several relationships with the Lillian Taras Family Trust ("Trust"). The Trust was established in 1992 by Debtor's mother, Lillian Taras. A copy of the trust document was admitted into evidence as Joint Exhibit 1. The Debtor, Debtor's now-deceased wife, Madeleine J. Taras, and Debtor's brother, Burt Taras, were designated as the trustees of the Trust. The assets of the Trust at its creation were one piece of real estate and various stocks and bonds. The value of the Trust assets as reflected in Exhibit 1 was $351,604.80. After the establishment of the Trust, Debtor used his position as a trustee to withdraw funds. The funds withdrawn from the Trust were consistently characterized by Debtor as loans to him or his business. Joint Exhibit 2, admitted into evidence, shows that the Trust made loans to Debtor or his business in the total amount of $380,473.74 during the years 1992 through 1996. Debtor testified that he continued to withdraw funds from the Trust after 1996 but did not maintain a ledger for those sums. These sums were withdrawn by Debtor without the knowledge or consent of his brother and co-trustee, Burt Taras. The sums were used to support Debtor's business and Debtor's personal needs.

Lillian Taras died in 2000. She had a will, of which Debtor was a named beneficiary, but the will was never probated. The assets of the Trust at that point were located in a bank account maintained at SunTrust, a brokerage account at Smith Barney and mutual funds maintained by Putnam Investments, Morgan Stanley and Van Kampen Investments. The real estate in the Trust, the former residence of Lillian Taras, had been sold and the proceeds paid to Burt Taras. In November 2000, the assets at Smith Barney were transferred to a joint account titled in Debtor and his brother. That account still exists in both names and Burt Taras

receives monthly distribution checks from the account. The other remaining trust assets (mutual funds) were transferred to Burt Taras in January 2004, after the commencement of Debtor's chapter 7 case.

Debtor testified that he did not include funds which he had taken from the Trust during the two years preceding the filing of his Chapter 7 case in response to Question 2 on the Statement of Financial Affairs because he did not consider the distributions to be "income." Rather, he considered that they were "funds." However, this testimony lacks any credibility where Debtor did list in response to that same Question 2 of the Statement of Financial Affairs, loans, distributions and liquidations from other assets.

Debtor, likewise, did not list his interest in the Trust on Question 19 of Schedule B which asks for "Contingent and non-contingent interest in estate of a decedent, death benefit plan, life insurance policy or trust." Debtor answered "None" in response to this listing. Additionally, the joint account with his brother at Solomon Smith Barney was omitted from Question 2 of Schedule B, which specifically inquires about the Debtor's interest in financial accounts, including those at brokerage houses. Burt Taras testified that this account had a value of approximately $50,000 at the time of the transfer of the trust assets to the account in early 2004. Finally, Debtor did not list the Lillian Taras Family Trust as a creditor on Schedule F despite the fact that he had borrowed substantial sums from the Trust, including numerous transactions within the four months immediately prior to his August 2003 bankruptcy filing. In fact, Debtor continued to withdraw funds from the Trust after the bankruptcy filing through the payment of various personal expenses from the Trust account maintained at SunTrust Bank in Atlanta.

Several other inaccuracies appear in Debtor's filings with the Bankruptcy Court. While Schedule B lists four life insurance policies, the schedule reflects a zero value for each of the policies. Notwithstanding that representation, Debtor apparently was able to withdraw funds from the policies as either a loan or cash surrender value after the filing of his Chapter 7 case.

Debtor's Chapter 7 filing appears to have been precipitated by the collection activities of Plaintiff. The Statement of Financial Affairs goes into great detail about the actions taken

by Plaintiff pre-bankruptcy to collect its debt. After filing his Chapter 7 case, Plaintiff filed and successfully prosecuted (through an appeal to the Eleventh Circuit Court of Appeals) a motion, pursuant to 11 U.S.C. § 522, seeking to avoid the judgment lien that Plaintiff maintained on Debtor's residence. No other creditors have taken an active role in Debtor's case.

Debtor's explanation for not including the Trust on his Statement of Financial Affairs or his Schedules is that the funds he received were not "income." Debtor testified that the omission of the Trust as an asset was based upon an indication from the IRS in connection with an offer in compromise of his tax obligations that they did not take the assets of the trust into consideration.

Plaintiff also contends that Debtor omitted several creditors from his schedules, in addition to the Trust. These include clients of debtor's business and his tax attorney, Vivian Horde. Debtor indicated that he did not consider these to be the types of creditors that he needed to schedule since the loans from clients might be characterized as gifts or advance payment for services and his obligation to his tax attorney was a current and ongoing obligation, much like his utility bills.

CONCLUSIONS OF LAW

The discharge provided by the Bankruptcy Code is to effectuate the "fresh start" for a debtor. However, in exchange for that fresh start, the Bankruptcy Code requires debtors to accurately and truthfully present themselves before the Court. A discharge is only for the honest debtor. *In re Bostrom*, 286 B.R. 352, 359 (Bankr. N.D.Ill. 2002).

Section 727(a)(4) provides in pertinent part, as follows:

The Court shall grant the debtor a discharge unless –

. . . (4) the debtor knowingly and fraudulently, in or in connection with the case–

(A) made a false oath or account.

Thus, Section 727(a)(4) is designed "to insure that debtors provide reliable information to those with an interest in the administration of the debtor's estate." *Butler v. Ingle (In re Ingle),* 70 B.R. 979, 983 (Bankr.E.D.N.C. 1987). The plaintiff in an action under 11 U.S.C. § 727 bears the burden of proving that the debtor is not entitled to a discharge. *See* Fed. R. Bankr. P. 4005. The plaintiff must prove its case by a preponderance of the evidence. *Beaubouef v. Beaubouef (In Re Beaubouef),* 966 F.2d 174, 178 (5th Cir. 1992); *First Nat'l Bank of Gordon v. Serafini (In re Serafini),* 938 F.2d 1156, 1157 (10th Cir. 1991).

To justify the denial of a discharge under subsection (A), the false oath must be (1) fraudulent and (2) material. *See Swicegood v. Ginn,* 924 F.2d. 230, 232 (11th Cir. 1991). Cases under this section almost always involve omissions from the debtor's schedules. *See, e.g., Swicegood,* 924 F.2d at 232; *Beaubouef,* 966 F.2d at 178.

Deliberate omissions from the schedules may constitute false oaths and result in the denial of a discharge. *Chalik v. Moorefield (In re Chalik),* 748 F. 2d 616, 618 n.3 (11th Cir. 1984). The plaintiff must demonstrate actual, not constructive fraud; *Wines v. Wines (in Re Wines),* 997 F. 2d 852, 856 (11th Cir. 1993). However, since a defendant will rarely admit his fraudulent intent, actual intent may be inferred from circumstantial evidence. *Ingersoll v. Kriseman (In re Ingersoll),* 124 B.R. 116, 123 (M.D. Fla. 1991); *Ingle* 70 B.R. at 983. Furthermore, "[a] reckless indifference to the truth is sufficient to constitute the requisite fraudulent intent for denying a discharge under section 727." *Id.* A series or pattern of errors or omissions may have a cumulative effect giving rise to an inference of an intent to deceive. *Kalvin v. Clawson (In re Clawson),* 119 B.R. 851, 852-53 (Bankr. M.D. Fla. 1990); *Buck v Buck (In re Buck),* 166 B.R. 106, 109 (Bankr. M.D. Tenn 1993). However, the discharge may not be denied when the untruth was the result of a mistake or inadvertence. *Beaubouef,* 966 F. 2d at 178; *First American Bank of N.Y. v. Bodenstein (In re Bodenstein),* 168 B.R. 23, 32 (Bankr. E.D.N.Y. 1994).

It is undisputed that at the time Debtor filed his Chapter 7 case, he had an interest as a beneficiary of the Trust which was not disclosed either on the Schedule of Personal Property or as a source of income in the years preceding the filing of the case. The debtor had an

affirmative duty to fully disclose all assets and failing to do so constitutes a material omission. *Netherton v. Baker (In re Baker)*, 205 B.R. 125, 133 (Bankr.N.D.Ill. 1997). Courts have consistently required the disclosure of a trust as an asset which debtors have a mandatory duty to disclose. *See Banc One, Texas, N.A. v. Braymer (In re Braymer)*, 126 B.R. 499, 502 (Bankr.N.D.Tex. 1991)(discharge denied where debtor failed to disclose trust created under her father's will as to which debtor had a contingent interest); *In re Katz*, 203 B.R. 227, 233 (Bankr.E.D.Pa. 1996); *Spencer v. Blanchard (In re Blanchard)*, 201 B.R. 108, 113, 124, 127 (Bankr.E.D.Pa. 1996).

Debtor filed the case without advice of counsel and testified that he believed, based upon his study of the law from a layman's bankruptcy book, that he did not need to disclose the existence of his interest. Debtor's interpretation of the law is incorrect. All property of the estate must be disclosed and the definition of property of the estate in 11 U.S.C. § 541(a) is very broad, encompassing *all legal or equitable interests of the debtor. See* 11 U.S.C. § 541(a).

The question then becomes whether the non-disclosure was fraudulent or "in reckless disregard of the truth." The court believes that a reasonable person would understand the questions on the schedules and statements to encompass a disclosure of Debtor's relationships with the Trust. Question 19 on Schedule B specifically mentions trusts. Debtor had used the funds in the Trust for payment of his personal living expenses and for his business expenses for many years and took withdrawals in the months immediately preceding the filing of the case. Question 2 on the Statement of Financial Affairs requests information on income other than from employment or operation of a business. Debtor consistently withdrew funds from the Trust and never demonstrated any intent to repay them. The Court does not see how these "funds" can be characterized any differently from loans taken from life insurance policies, a source of "income" that was disclosed in Debtor's Statement of Financial Affairs. The Debtor testified that he made a conscious decision to omit the income derived from the Trust from his Statement of Financial Affairs. Importantly, this was not a situation where an unsophisticated debtor acting *pro se* merely neglected to list an item that he should have. Debtor purposely

decided not to reveal the information. It is clear that he should have listed the Trust income on the Statement of Financial Affairs and the existence of his interest in the Trust on his Schedule B, and his decision not to do so deprived creditors and the Chapter 7 Trustee of the opportunity to evaluate the existence of assets potentially available to pay their claims.

Debtor was aware of the fact that assets remained in the Trust and while he believed he was not equitably entitled to the remaining funds, he is charged with knowing that a Chapter 7 Trustee would have an interest in examining the rights of creditors to his interests in the Trust. "The bankruptcy schedules and statement of financial affairs do not ask the debtor to make an assessment of what *he* thinks are important assets or debts. Debtor must, under oath, list all creditors and assets.... If a debtor is uncertain as to whether certain assets are legally required to be included in his petition, it is his duty to disclose the assets so that the question may be resolved." *The Cadle Co. v. King (In re King),* 272 B.R. 281, 300 (Bankr. N.D.Okla. 2002) (internal citations omitted). Creditors and the trustee are entitled to information pertaining to a debtor's income so they may investigate, among other things, whether the debtor has hidden funds to conceal them from creditors. *In re Montgomery*, 309 B.R. 563, 567 (Bankr.W.D.Mo. 2004) *citing The Cadle Co. v. King*, 272 B.R. at 299.

With respect to the failure to list creditors, Debtor again came to an interpretation of the law which is incorrect. All creditors, including those with whom a debtor has a continuing relationship must be scheduled. *See* 11 U.S.C. § 521 and Fed. R. Bankr. P. 1007(a).

In order to bar a discharge, the false oath must also be material. The Court also finds that in this instance the omission of the disclosure of the Trust is material to the bankruptcy case. The threshold to establish materiality is low. *Rasmussen v. Unruh (In re Unruh)*, 278 B.R. 796, 803 (Bankr.D.Minn. 2002). Materiality is established if the oath "bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property." *Congress Talcott Corp. v. Sicari (In re Sicari)*, 187 B.R. 861, 881 (Bankr. S.D.N.Y. 1994) *citing Williamson v. Fireman's Fund Insurance Co.*, 828 F.2d 249, 251 (4th Cir. 1987), *also see Chalik,* 748 F.2d at 618. The creditor does not have to establish that it was harmed or prejudiced to satisfy

materiality. *In re Robinson*, 506 F.2d 1184, 1188 (2nd Cir. 1974). While no exact accounting of Trust assets has been made, it appears that the Trust assets in the joint bank account were approximately $50,000 during the pendency of Debtor's case. Aside from the claim of the Internal Revenue Service, Debtor had approximately $200,000 of scheduled secured and unsecured claims. Against this backdrop, the failure to disclose the existence of his interest in the Trust is also material in amount.

The Court finds that Debtor's failure to disclose his interest in the Trust constitutes a material omission because the Trust bears a direct and indisputable relationship to his bankruptcy estate and concerns the discovery and existence of assets. The Debtor's schedules and statements were completed with such particularity that the omission of the Trust, an entity that played such a conspicuous role in Debtor's life for several years prior to the bankruptcy, is striking. Upon consideration of all the facts and circumstances, the Court reaches the conclusion that the omission of the Trust in Debtor's schedules constitutes, at the very least, a reckless disregard for the truth sufficient as to warrant the denial of his discharge. Accordingly, it is

ORDERED that Debtor's discharge is **DENIED** pursuant to 11 U.S.C. § 727(a)(4)(A). A separate judgment will be entered by the Court.

The Clerk is directed to mail a copy of this Order on the parties listed on the attached distribution list.

IT IS SO ORDERED.

At Atlanta, Georgia, this the 19th day of August, 2005.

Mary Grace Diehl

MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE

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