

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE  
SOUTHERN DISTRICT OF GEORGIA  
Statesboro Division

IN RE:	)	Chapter 7 Case
	)	Number <u>89-60229</u>
ROGER CURTIS BRANNEN, SR.	)	
	)	
Debtor	)	
_____)	Filed	
	)	at 5 O'clock & 00 PM
BROWER OIL COMPANY, INC.	)	Date 6-27-90
	)	
Plaintiff	)	
	)	
vs.	)	Adversary Proceeding
	)	Number <u>89-6011</u>
ROGER CURTIS BRANNEN, SR.	)	
	)	
Defendant	)	

**ORDER**

Plaintiff, Brower Oil Co., Inc. ("Brower Oil") brought this action seeking a denial of the discharge of the debtor from his debts under 11 U.S.C. §727(a)(2) and (3). Debtor, Roger C. Brannen, Sr., filed a counterclaim against Brower Oil alleging that Brower Oil violated the automatic stay of 11 U.S.C. §362. After considering the pleadings, stipulations and evidence presented at trial, and the arguments of counsel, the court makes the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

1. The debtor filed for protection from his creditors under Chapter 7 of the Bankruptcy Code on July 5, 1989, and the order for relief was entered on July 6, 1989.
2. On November 12, 1986, Brower Oil obtained a judgment against the

debtor in the Superior Court of Screven County, Georgia, for a debt owed Brower Oil.

3. Debtor advertised an auction of service station equipment owned by debtor. Debtor planned to have the auction conducted by an auction company owned by him, Brannen Auction and Realty Company, at 10:00 a.m. on July 30, 1988.

4. Brower Oil had planned to levy upon the service station equipment, and its representative accompanied the Sheriff of Screven County, Georgia to the place of the auction for the purpose of levying on the equipment. However, the representative of Brower Oil agreed to permit the auction to occur and to levy instead on the sale proceeds.

5. Johnny Cobb, a friend of the debtor, was the successful bidder at the auction, buying all of the service station equipment, which included among other things four (4) gas pumps, for the total of One Thousand and No/100 (\$1,000.00) Dollars.

6. All of the equipment, including the gas pumps, were stored in a warehouse owned by Robert Ellison. In October, 1988, the debtor agreed to sell the four (4) gas pumps to Ellison for the sum of Two Thousand and No/100 (\$2,000.00) Dollars which was to be paid in installments of Fifty and No/100 (\$50.00) Dollars per week or more if possible until the balance was paid in full. Ellison filed for protection under Chapter 7 of the Bankruptcy Code on November 4, 1988, but did not list debtor as a creditor in his petition. Ellison paid at least Two Hundred Twenty-Five and No/100 (\$225.00) Dollars to debtor prior to debtor filing his bankruptcy petition.

7. After the debtor's petition and subsequent to the discharge of his debts, Ellison paid the debtor an additional One Hundred Seventy-Five and No/100 (\$175.00) Dollars in installment payments and a final payment of One Thousand Six Hundred Fifty and No/100 (\$1,650.00) Dollars. The debtor did not list the debt owed him by Ellison as an account receivable in his petition.

8. In August, 1988, the debtor's name was removed from the joint checking account that the debtor and his wife had maintained at the First Union National Bank of Georgia. Debtor's wife, Sandra B. Brannen, opened a new individual account at the Bank of Newington on August 22, 1988.

9. After the July 30, 1988 auction sale, the debtor never deposited

any checks or other income into a bank account on which he was a signatory. All of the debtor's checks were either cashed or deposited into the bank account of his wife at the Bank of Newington.

10. The debtor has been a licensed auctioneer since 1966 and operated an auction business known as Brannen Auction and Realty Company. The debtor's son, Roger Curtis Brannen, Jr., is also a licensed auctioneer doing business as Brannen Auction Service. Prior to the auction sale of July 30, 1988 when Brower Oil attempted to levy on the debtor's property, debtor's son never booked any auctions or held any auctions under his name or his company's name. Debtor's son assisted the debtor in conducting auctions and was paid a small salary.

11. In March and April, 1989, the debtor's son booked and conducted two large auctions of farm equipment. The debtor assisted his son with these auctions and received over Three Thousand Eight Hundred and No/100 (\$3,800.00) Dollars for the work. The debtor was initially contacted to conduct these two auctions, but referred the sales to his son.

12. Lee Holmes Brower ("Brower"), the former sole shareholder of the corporation, Brower Oil, sold the stock of the corporation to his two sons and his son-in-law in 1984. Brower is still employed by Brower Oil, but is not a shareholder, officer or director of the corporation.

13. Brower is a cousin of the debtor's wife and has known the debtor's wife for many years. Subsequent to the debtor filing for protection under Chapter 7 of the Bankruptcy Code, Brower contacted the debtor's wife. The date of the visit is a point of

controversy. Brower contends that the visit occurred in July, 1989. The debtor's wife alleges that the visit occurred on or about August 25, 1989. Brower maintains that he went to visit the debtor's wife because members in Brower's church were requesting prayer for the debtor and his wife because Brower was trying to take away

their home. The debtor's spouse maintains that Brower came to the house to discuss the debtor's pending bankruptcy case. She testified that Brower threatened a scandal if the debtor did not settle his obligations with Brower Oil. The court finds the debtor's wife's testimony credible and concludes that Brower visited the home in August on behalf of Brower Oil in an effort to collect the debt.

14. Brower previously has been reprimanded by then Judge of this court, Herman W. Coolidge, for violating the automatic stay of 11 U.S.C. 362 in another proceeding.

#### CONCLUSIONS OF LAW

Brower Oil objects to the debtor's discharge on two different grounds under 11 U.S.C. §727. Brower Oil contends that the debtor, with the intent to hinder, delay, or defraud a creditor or an officer of the estate, transferred, removed, or concealed, or permitted to be transferred, removed, or concealed property of the debtor within one year before the date of the filing of the petition, and property of the estate, after the date of the filing. See, 11 U.S.C. §727(a)(2). Brower Oil also contends that the debtor

failed to keep or preserve any recorded information from which the debtor's financial condition or business transactions could be ascertained. See 11 U.S.C. §727(a)(3). Each of these allegations constitutes a separate basis upon which discharge may be denied. Regarding the §727(a)(3) basis for denial of discharge, at trial, Brower Oil failed to present any evidence in support of this count of its complaint and is deemed to have abandoned same. As it pertains to the remaining allegation denial of discharge is appropriate.

Pursuant to Bankruptcy Rule 4005, a creditor objecting to a Chapter 7 debtor's discharge under 11 U.S.C. §727 must carry the burden of proof, and that burden must be met by clear and convincing evidence. In re: Cohen, 47 B.R. 871 (Bankr. S.D. Fla. 1985); Great Southern Savings Bank v. Harmon (In re: Harmon), Ch. 7 Case No. 89-40101, Adv. No. 89-4036, slip op. at 14 (Bankr. S.D. Ga. Nov. 28, 1989). "The provisions denying a discharge to debtor are generally construed liberally in favor of the debtor and strictly against the creditor." 4 Collier on

Bankruptcy ¶727.01A (L. King 15th ed. 1989).

To sustain an objection to discharge under 11 U.S.C. §727(a)(2), the creditor must show (1) that the act complained of was done at a time subsequent to one year before the date of the filing of the petition for relief or after the date the petition was filed; (2) with actual intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under the Bankruptcy Code; (3) that the act was that of the debtor or his duly authorized agent; and (4) that the act consisted of transferring, removing, destroying or concealing any of the debtor's property, or permitting any of these acts to be done. 4 Collier on Bankruptcy ¶727.02(b) (L. King 15th ed. 1989). "The purpose of this section is to prevent the discharge of a debtor who attempts to avert collection of his debts by concealing or otherwise disposing of assets." In re: Kessler, 51 B.R. 895, 898 (Bankr. Kan. 1985). Actual intent to hinder, delay, or defraud creditors must be shown by the party objecting to discharge. First Texas Savings Assoc. v. Reed (In re: Reed), 700 F.2d 986 (5th Cir. 1983). A finding of actual intent may be based on circumstantial evidence or on inferences drawn from a course of conduct because the debtor is unlikely to testify that the intent was fraudulent. In re: Devers, 759 F.2d 751 (9th Cir. 1985); Farmers Co-op Assoc. v. Strunk, 671 F.2d 391 (10th Cir. 1982).

This debtor engaged in a pattern of conduct which would give rise to a finding of actual intent to hinder, delay, and defraud creditors. The debtor represented to the plaintiff that the debtor would conduct an auction sale of the debtor's service station equipment and allow Brower Oil to levy on the sale proceeds. Brower Oil agreed to such a sale. A friend of the debtor, however, bid a low price at the sale and the debtor subsequently, sold a portion of the same items for twice the price bid at the auction to a third party. The debtor had his name removed from a joint checking account he shared with his wife after Brower Oil became an active judgment creditor attempting to collect the judgment and deposited all of his funds into an account with only his wife listed as

a signatory. After Brower Oil attempted to collect on its judgment, the debtor ceased to operate his auction business and requested that those who contacted him about auctions only deal with his son's auction company. Prior to the plaintiff's efforts to collect its judgment, the debtor's son only assisted the debtor in conducting auctions for a nominal fee; but subsequent to Brower Oil's collection efforts the auction business shifted to the son's company with substantial fee payments to the debtor. While these activities taken individually may be insufficient to establish the intent of the debtor to hinder, delay, and defraud Brower Oil, taken as a whole the debtor's actions establish a pattern of conduct designed to frustrate the efforts of a judgment creditor.

The debtor also failed to list in his schedules the account receivable due him by Robert Ellison. Ellison paid the debtor for four (4) gas pumps the sum of One Thousand Eight Hundred Twenty-Five and (\$1,825.00) Dollars on a pre-petition account receivable after the debtor filed for protection under the Bankruptcy Code. The debt and the payment on the debt were property of the debtor's bankruptcy estate pursuant to 11 U.S.C. §541, and

the debtor has concealed this property from the trustee, the creditors of the estate, and the court. These actions are sufficient to bar the debtor from a discharge of his debts under Chapter 7 of the Bankruptcy Code. "The protection and forgiveness inherent in the bankruptcy laws surely requires conduct consistent with the concepts of basic honesty." In re: Waldron, 785 F.2d 936, 941 (11th Cir. 1986). This debtor has demonstrated actions designed to hinder delay, and defraud creditors through the transfer and concealment of property within one year of filing and since his petition was filed.

As to the debtor's counterclaim for a stay violation, the court concludes that the plaintiff's agent, Lee Holmes Brower, did willfully violate the automatic stay of 11 U.S.C. §362(a). Brower went to the debtor's home on behalf of Brower Oil with knowledge of the debtor's bankruptcy petition and threatened the debtor's wife with a scandal if the debtor failed to pay Brower Oil. A creditor who pressures a third party to force a Chapter 7 debtor to pay a debt violates the automatic stay. Any act to collect, assess, or recover a claim against the debtor that arose

before the commencement of a case under the Bankruptcy Code is stayed. See 11 U.S.C. §362(a)(6). Brower on behalf of Brower Oil committed such an act.

A party who is injured by any willful violation of a stay provided by the Bankruptcy Code is entitled to recover actual

damages, including costs and attorneys's fees, and in appropriate circumstances, punitive damages. 11 U.S.C. §362(h). The debtor's wife testified that she was upset by Brower's visit and talked with the debtor. The debtor offered no evidence of any damages suffered as a result of the stay violation other than the wife's testimony that she was upset by the visit which could be construed as an injury to the peace and tranquility of the debtor's home thereby causing damage to the debtor. See, Wagner v. Ivory (In re: Wagner), 74 B.R. 898 (Bankr. E.D. Pa. 1987) (actual damages awarded where debtor experienced shock, fear, and alarm from creditors actions, but no long-term physical or emotional harm); Mercer v. D.E.F., Inc., 48 B.R. 562 (Bankr. D. Minn. 1985) (debtor awarded actual damages for humiliation, embarrassment, anxiety, and frustration caused by creditor's actions). From the limited evidence presented an award of more than nominal damages would be speculative. Debtor is entitled to recover actual damages for the stay violation and is awarded One Hundred and No/100 (\$100.00) Dollars. The debtor testified at the trial that he had incurred Three Thousand Eight Hundred and No/100 (\$3,800.00) Dollars in attorney fees as a result of this adversary proceeding, but no other supporting evidence such as the attorney's time records have been submitted. From the lack of evidence, the court cannot determine what portion of those fees were incurred in prosecuting the counterclaim for the stay violation as opposed to defending against

the complaint. As Brower Oil was successful in its objection to discharge, Brower Oil should not bear the debtor's attorney fees for the entire adversary proceeding. Obviously some aspect of the attorneys fees were incurred in

prosecuting the stay violation and the debtor is awarded One Hundred and No/100 (\$100.00) Dollars as reimbursement for his attorneys fees. Brower Oil through its agent willfully violated the automatic stay of 11 U.S.C. §362, and in view of Brower's prior reprimand for stay violations punitive damages of Five Hundred and No/100 (\$500.00) Dollars are appropriate.

What has emerged in this case is a pattern of conduct by all parties that evidences an absolute contempt for the law. This court is convinced that the debtor intentionally concealed assets prior to filing his petition and failed to disclose assets in his schedules after filing. The creditor through its agent with full knowledge of the scope and implications of the §362 stay contemptuously disregarded the stay in an effort to collect its debt. But for the conduct of the debtor in this case, substantial punitive damages would be appropriate. See Wagner, supra at 905

(punitive damages should be sufficient to impress upon a party his obligation to comply with orders of the court and deter future transgressions). From the conduct of the parties, it is appropriate that this creditor compound its expenditure of time, effort and money on what has been and appears in all likelihood to remain a futile effort at collecting the balance of its judgment. It is

equally fitting that this debtor be subjected to continued creditor collection harassment that a discharge from this court would have brought to an end.

For the above stated reasons, it is ORDERED that judgment is entered for plaintiff, Brower Oil Company, Inc. against the defendant debtor, Roger C. Brannen, Sr., denying the debtor a discharge under Chapter 7 of Title 11, United States Code; and

Further ORDERED that debtor recover the sum of Seven Hundred and No/100 (\$700.00) Dollars from Brower Oil Company, Inc. on debtor's counterclaim which award is satisfied by set off against the judgment held by Brower Oil against the debtor. No further right of recovery of this award to the debtor is authorized.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 27th day of June, 1990.