

FILED

Lucinda B. Rauback, Clerk
United States Bankruptcy Court
Brunswick, Georgia
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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

IN RE: BONNIE J. WILLIAMSON)	CHAPTER 7 CASE
)	NUMBER <u>11-60755</u>
Debtor)	
)	
<u>DONALD F. WALTON, U.S. TRUSTEE</u>)	
)	
Plaintiff)	
)	
vs.)	ADVERSARY PROCEEDING
)	NUMBER <u>12-06011</u>
BONNIE J. WILLIAMSON)	
)	
Defendant)	

OPINION AND ORDER GRANTING SUMMARY JUDGMENT

This matter comes before me on the motion for summary judgment ("Motion") by Plaintiff Donald F. Walton, United States Trustee for region 21 ("Trustee"). The complaint seeks to deny Defendant Bonnie J. Williamson ("Debtor") a discharge under 11 U.S.C. § 727. Because I find that there is no genuine issue of the Debtor's culpability under § 727(a)(2)(A) and § 727(a)(4)(A), the Motion is granted.

BACKGROUND

Debtor filed a petition for chapter 7 bankruptcy on November 29, 2011.¹ (Case Dkt. No. 1; A.P. Dkt. No. 1 ¶ 8; A.P. Dkt. No. 4 ¶ 8; A.P. Dkt. No. 9 ¶ 3.) Subsequently, the case was converted to a chapter 13, and then re-converted to a chapter 7 on March 20, 2012.²

On June 8, 2012, the Trustee filed this adversary proceeding and in his complaint ("Complaint") alleged that Debtor should be denied discharge under 11 U.S.C. § 727. (A.P. Dkt. No. 1.) In her answer on July 11, 2012 ("Answer"), Debtor admitted most of the factual allegations set forth in the Complaint, but denied a fraudulent intent in withholding information and giving false testimony, and further denied that she had concealed recorded information from which her financial condition might have been ascertained. (A.P. Dkt. No. 4.)

Subsequently, on November 27, 2012, the Trustee filed

¹ References to the docket of the underlying chapter 7 case appear in the following format: "Case Dkt. No. ___." References to the docket of this adversary proceeding appear in the following format: "A.P. Dkt. No. ___."

² Debtor filed a motion to convert the case to a chapter 13 on January 31, 2012. (Case Dkt. No. 23.) While the United States Trustee and the chapter 7 trustee filed objections to the conversion, between the time of Debtor's motion and the Court's decision on the Debtor's motion, the case proceeded as a chapter 13. (Case Dkt. No. 33; Case Dkt. No. 34.) The court's order on March 20, 2012 re-converted the case to a chapter 7. (Case Dkt. No. 62.)

this Motion, and urged that, based on the undisputed facts, Debtor should be denied discharge. (A.P. Dkt. No. 9.) Although Debtor failed to respond, many of the undisputed facts are of record in the Answer and in the underlying case.³

UNDISPUTED FACTS

Approximately one month prior to filing for bankruptcy, Debtor transferred real property located at 130 Claude Sikes Circle, Collins, Georgia ("Property"), to her daughter, Carly W. Sharpe, for little or no consideration. (A.P. Dkt. No. 1 ¶ 11; A.P. Dkt. No. 4 ¶ 11; A.P. Dkt. No. 9 ¶¶ 1, 2, 3.) Before the transfer, Debtor had been the fee simple owner of the unencumbered Property since the death of her mother in 2006. (A.P. Dkt. No. 1 ¶¶ 12, 13; A.P. Dkt. No. 4 ¶¶ 12, 13; A.P. Dkt.

³ The local bankruptcy rules adopt the local summary judgment rule from the Southern District of Georgia, which states in part, "All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by a statement served by the opposing party." BLR Uniformity of Practice; LR 56.1, S.D. Ga. Since the Debtor failed to respond to the Motion, the factual allegations of the Trustee are deemed admitted.

However, since this is a motion for summary judgment, I must not only determine whether there is a genuine issue of material fact, but must also determine that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In this case, that determination partially hinges on the Debtor's intent. Therefore, I look to the record in the case to determine which facts the Debtor has admitted in an attempt to establish that intent.

No. 9 ¶ 1.) The Property is currently worth between \$45,000.00 and \$65,000.00.⁴ (A.P. Dkt. No. 1 ¶ 13; A.P. Dkt. No. 4 ¶ 13; A.P. Dkt. No. 9 ¶ 1.)

When Debtor filed for bankruptcy, she did not report the Property transfer in her Statement of Financial Affairs ("SOFA"), which made up a portion of her bankruptcy schedules and statements ("Schedules"). (A.P. Dkt. No. 1 ¶¶ 15, 16; A.P. Dkt. No. 4 ¶¶ 15, 16; A.P. Dkt. No. 9 ¶ 4.) She also signed a declaration swearing that the information in her Schedules was true and correct to the best of her knowledge. (A.P. Dkt. No. 1 ¶ 17; A.P. Dkt. No. 4 ¶ 17.)

At the 341 meeting of the creditors on January 4, 2012 ("341 Meeting"), the chapter 7 trustee asked Debtor about the Property transfer. (A.P. Dkt. No. 1 ¶ 9; A.P. Dkt. No. 4 ¶ 9; A.P. Dkt. No. 9 ¶ 5.) Debtor first testified that she had neither inherited any property from her mother nor transferred any property prior to filing for bankruptcy. (A.P. Dkt. No. 1 ¶ 9; A.P. Dkt. No. 4 ¶ 9.) However, when pressed by the trustee, she

⁴ In the Complaint, the Trustee indicated that the value of the Property according to the Tattnall County Tax Assessors Office is \$61,550.00. (A.P. Dkt. No. 1 ¶ 13.) In the Debtor's Answer, she states that the Property has been appraised for \$57,200.00. (A.P. Dkt. No. 3 ¶ 13.) In the Motion, the Trustee states that the Property is worth at least \$48,000.00. (A.P. Dkt. No. 9 ¶ 1.)

later indicated that she had transferred some real estate to her daughter in 2010. (A.P. Dkt. No. 1 ¶ 10; A.P. Dkt. No. 4 ¶ 10; A.P. Dkt. No. 9 ¶ 6.)

In reality, real estate records show that Debtor transferred the Property on October 27, 2011, just over a month before she filed for bankruptcy. (A.P. Dkt. No. 1 ¶ 11; A.P. Dkt. No. 4 ¶ 11; A.P. Dkt. No. 9 ¶ 2.) Thus, she not only gave false information in her Schedules, but also gave false testimony at the 341 Meeting. (A.P. Dkt. No. 1 ¶¶ 28, 29; A.P. Dkt. No. 4 ¶¶ 28, 29.) The record in the underlying case shows that after the 341 Meeting, Debtor amended her SOFA to reflect the Property transfer. (Case Dkt. No. 44.)

DISPUTED FACTS

While Debtor admits the preceding facts, she denies in her Answer the following assertions in the Complaint related to her intent:

(1) Debtor intentionally failed to provide adequate information and documents relating to her financial activities and circumstances (A.P. Dkt. No. 1 ¶ 14; A.P. Dkt. No. 4 ¶ 14);

(2) The Debtor, with intent to hinder, delay, or defraud her creditors or an officer of the estate charged with custody of property under the Bankruptcy

Code, transferred property within one year before the date of the filing of the petition and subsequently failed to disclose the transfer(s) (A.P. Dkt. No. 1 ¶ 19; A.P. Dkt. No. 4 ¶ 19);

(3) The Debtor with intent to hinder, delay, or defraud her creditors or an officer of the estate charged with custody of property under the Bankruptcy Code, concealed property of the estate by failing to disclose said property in her bankruptcy papers (A.P. Dkt. No. 1 ¶ 22; A.P. Dkt. No. 4 ¶ 22); and

(4) By omitting material information and/or including inaccurate information on her bankruptcy papers and by testifying falsely under oath, the Debtor knowingly and fraudulently, in or in connection with this case, made a false oath or account (A.P. Dkt. No. 1 ¶ 30; A.P. Dkt. No. 4 ¶ 30).

Since Debtor has already conceded both that she failed to disclose the Property transfer and that she made false representations at the 341 Meeting, her denial of the allegations listed above is not a denial of her underlying actions; instead, it is a denial that the intent behind those actions was to defraud creditors. Thus, Debtor's intent is the only question to be resolved on summary judgment under 11 U.S.C. §§ 727(a)(2)⁵ and

⁵ In the Complaint, the Trustee asserts that the Debtor should be denied discharge under § 727(a)(2)(A), dealing with the property of the Debtor, and § 727(a)(2)(B), dealing with the property of the estate. (A.P. Dkt. No. 1 ¶¶ 18-23.) In the Debtor's Answer, she disagrees on both grounds. (A.P. Dkt. No. 4 ¶¶ 19, 20, 22, 23.) However, since in the Motion, the Trustee does not assert § 727(a)(2)(B) as an additional ground for denial, I will not address it here.

727(a)(4)(A).⁶

CONCLUSIONS OF LAW

I. Summary Judgment Standard

Summary judgment is appropriate where it is shown that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c), made applicable here by Federal Rule of Bankruptcy Procedure 7056. A genuine issue exists where the evidence is such that a reasonable jury could return a verdict for the non-moving party. Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 919 (11th Cir. 1993) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Facts are material if they could affect the outcome of the suit under the applicable substantive law. Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997) (citing Anderson, 477 U.S. at 248; Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 998 (11th Cir. 1992)).

On a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of

⁶ The Trustee also argues that the Debtor should be denied discharge under § 727(a)(3), and the Debtor disputes this contention. (A.P. Dkt. No. 1 ¶¶ 25, 26; A.P. Dkt. No. 9; A.P. Dkt. No. 4 ¶¶ 25, 26.) However, having determined

the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. In making that determination, the facts must be viewed in a light most favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

A court may not grant a summary judgment motion merely because the motion is unopposed. United States v. One Piece of Real Prop. Located at 5800 SW 74th Ave., Miami, Florida, 363 F.3d 1099, 1101 (11th Cir. 2004). Rather, the court "must consider the merits of the motion" and "ensure that the motion itself is supported by evidentiary materials." Id. at 1101-02.

II. Discharge is denied under 11 U.S.C. § 727

Here, the Trustee argues that based on the undisputed facts, Debtor should be denied discharge under 11 U.S.C. § 727, specifically §§ 727(a)(2)(A) and 727(a)(4)(A). I agree.

A. 11 U.S.C. § 727(a)(2)(A)

First, under 11 U.S.C. § 727(a)(2)(A), a court shall deny discharge when a debtor transfers property within one year before filing his bankruptcy petition if the transfer is made "with intent to hinder, delay, or defraud a creditor." Therefore,

that summary judgment is appropriate on the other two counts, I do not reach

to successfully object to discharge under this section, a creditor must establish four elements:

(1) that the act complained of was done within one year prior to the date the petition was filed, (2) with actual intent to hinder, delay, or defraud a creditor, (3) that the act was that of the debtor, and (4) that the act consisted of transferring, removing, destroying, or concealing any of the debtors property.

In re Leto, 315 F. App'x 800, 801 (11th Cir. 2009) (citing In re Jennings, 533 F.3d 1333, 1339 (11th Cir. 2008)).

Because denying a debtor discharge is an extraordinary remedy, "[w]hen analyzing these elements, a court should construe § 727's denial of discharge liberally in favor of the debtor." Hines v. Marchetti, 436 B.R. 159, 165 (M.D. Ala. 2010) (citing Guerra v. Fernandez-Rocha (In re Fernandez-Rocha), 451 F.3d 813, 816 (11th Cir. 2006)); see also In re Oliver, No. 11-4041-MGD, 2012 WL 2930050, at *2 (Bankr. N.D. Ga. June 11, 2012) (citing E. Diversified Distributions, Inc. v. Matus (In re Matus), 303 B.R. 660, 672 (Bankr. N.D. Ga. 2004)).

In this case, it is undisputed that Debtor transferred the Property to her daughter within a year of filing for bankruptcy; thus, it is undisputed that elements 1, 3, and 4 are

this count.

met. The only element in dispute is whether Debtor intended to hinder, delay, or defraud her creditors.

"Since it is unlikely that a debtor will admit that [s]he intended to hinder, delay, or defraud a creditor, actual intent to do so may be established by circumstantial evidence or by inferences drawn from a course of conduct." Hines v. Marchetti, 436 B.R. at 165 (citing In re Jennings, 533 F.3d at 1339); see also In re Osterman, 296 F. App'x 900, 902 (11th Cir. 2008) (citing In re Ingersoll, 124 B.R. 116, 121 (M.D. Fl. 1991)) ("In order to find fraudulent intent, the court can consider circumstantial evidence or can infer it from the debtor's action."); In re Heraud, 410 B.R. 569, 578-79 (Bankr. E.D. Mich. 2009) (quoting Hunter v. Sowers (In re Sowers), 229 B.R. 151, 157 (Bankr. N.D. Ohio 1998)) ("Just one wrongful act may be sufficient to show actual intent However, a continuing pattern of wrongful behavior is a stronger indication of actual intent.")

Courts have identified several indicia of fraud that tend to show that a debtor had an actual intent to defraud [] creditors. They include:

(1) the lack or inadequacy of consideration for the property received;

(2) the nature of the relationship between the transferor and the transferee;

(3) whether the transferor retains possession, control, benefits, or use of the property in question;

(4) whether the transfer resulted in insolvency;

(5) the cumulative effect of the debtor's transactions and course of conduct after the onset of financial difficulties or threat of suit by creditors; and

(6) the general chronology and timing of the transfer in question.

In re Jennings, 533 F.3d at 1339 (citing In re Marrama, 445 F.3d 518, 522 (1st Cir. 2006)); see also In re Osterman, 296 F. App'x at 902. Courts have also considered whether the debtor has failed to disclose property transfers in his schedules and statements or has made false representations at a 341 meeting. See In re Butler, No. 11-80094-JAC-7, 2012 WL 1345321, at *3-4 (Bankr. N.D. Ala. Apr. 17, 2012).

"Once [a] creditor introduces circumstantial evidence indicating the debtor's [fraudulent] intent, the debtor must respond with more than an unsupported assertion of honest intent." Hines v. Marchetti, 436 B.R. at 165 (citing Matter of Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987)). "Mere unsubstantiated denials . . . are insufficient to overcome [] a conclusive demonstration of the absence of a genuine issue of

material fact." In re Caserta, 182 B.R. 599, 606-07 (Bankr. S.D. Fl. 1995) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

In this case, Debtor transferred the Property for no consideration to her daughter, an insider of the Debtor,⁷ just over a month before she filed for bankruptcy. Debtor did not disclose the transfer in her Schedules and gave false testimony about the transfer at the 341 Meeting. While Debtor amended her SOFA after the 341 Meeting to include the Property transfer, she did so only after the discovery of the transfer by the chapter 7 trustee. Taken together, these actions show a clear intent to defraud or at least hinder or delay her creditors.⁸ Furthermore, while Debtor has denied fraudulent intent in her Answer, she has offered no evidence to controvert the accusations of fraud either

⁷ See 11 U.S.C. § 101(31)(A)(i), defining insider to include a relative of the debtor.

⁸ In its order denying Debtor's motion to convert the underlying bankruptcy case to a chapter 13, the court found that by making false and misleading statements about the Property, Debtor had acted in bad faith and had therefore forfeited her right to convert to a chapter 13. (Case Dkt. No. 62.) As some courts have held that fraudulent intent under § 727 also requires showing of bad faith, the court's finding in the order denying conversion provides further support for denying discharge under § 727. See, e.g. In re O'Neil, 102 B.R. 843, 848 (Bankr. M.D. Fl. 1989).

in her Answer or in response to this Motion.⁹ Therefore, summary judgment is proper under § 727(a)(2)(A).

B. 11 U.S.C. § 727(a)(4)(A)

Section 727(a)(4)(A) establishes a separate ground for denying a debtor discharge. Under § 727(a)(4)(A), discharge should be denied if "the debtor knowingly and fraudulently, in or in connection with the case made a false oath or account." The false oath must be both fraudulent and material, and materiality is determined by whether "the matter is 'pertinent to the discovery of assets, including the history of a bankrupt's financial transactions.'" Dorsey v. DePaola, No. 2:11-CV-1026-MEF, 2012 WL 1957713, at *12 (M.D. Ala. May 31, 2012) (quoting Chalik v. Moorefield (In re Chalik), 748 F.3d 616, 618 (11th Cir. 1984)); see also In re Phillips, 476 F. App'x 813, 816 (11th Cir. 2012). Deliberate omissions by the debtor, including omissions in the debtor's SOFA and schedules, may constitute false oaths under this provision. In re Protos, 322 F. App'x 930, 933 (11th Cir.

⁹ At the hearing on Debtor's motion to convert the underlying bankruptcy to a chapter 13, Debtor indicated that she transferred the Property to her daughter so that in case something should happen to her, her brother would have a place to live. (Case Dkt. No. 57). However, she gave no explanation for why she did not initially report the transfer in her schedules. She also gave no explanation for her false testimony at the 341 meeting other than indicating that she was "nervous." Id. Furthermore, she presented no response to the Motion in this adversary that would establish reasons for her actions.

2009) (citing Chalik, 748 F.3d at 618); Phillips, 476 F. App'x 813, 816 (11th Cir. 2012) (citing Chalik, 748 F.3d at 618).

In this case, the parties agree that Debtor gave several false statements: Debtor failed to list the Property transfer in her Schedules and gave false testimony regarding that transfer at the 341 Meeting. Since both of these representations related to the discovery of the Property, they were not only false but also material to the bankruptcy case.

Nevertheless, as under § 727(a)(2)(A), while the Debtor's false representations are undisputed, Debtor denies that her intent was fraudulent. However, just as fraudulent intent under § 727(a)(2)(A) can be inferred by a series of wrongful behavior, fraudulent intent under § 727(a)(4)(A) can be inferred by a pattern of concealment. See Dorsey, 2012 WL 1957713, at *12 (citing Protos, 322 F. App'x at 933) ("Fraudulent intent can be inferred by a pattern of multiple non-disclosures and improper disclosures."); In re Franklin-Graham, No. 05-91520-MGD, 2008 WL 7842108, at *6 (Bankr. N.D. Ga. 2008) (quoting Parnes v. Parnes (In re Parnes), 200 B.R. 710, 714 (Bankr. N.D. Ga. 1996)) ("The Court may infer fraud from 'a series or pattern of errors or omissions may have a cumulative effect giving rise to an

inference of an intent to deceive.'"); see generally In re Eigsti, 323 B.R. 778, 783-85 (Bankr. M.D. Fl. 2005).

Here, by first omitting any reference to the Property transfer on her Schedules and then by lying about the same transfer at the 341 meeting, Debtor engaged in a pattern of concealment. Since Debtor has failed to offer an explanation that would lead a reasonable jury to decide that her intent was not fraudulent, her intent is not a genuine issue in this case. Therefore, summary judgment is also proper under § 727(a)(4)(A).

CONCLUSION

Generally, when a debtor's intent is at issue, objections to discharge cannot be resolved at the summary judgment stage. See In re Hines, 418 B.R. 393, 404 (Bankr. M.D. Ala. 2009); see also In re Oliver, 2012 WL 2930050, at *2 (citing Owens v. Owens (In re Owens), No. 05-1706, 2006 WL 6589904, at *4 (Bankr. N.D. Ga. Feb. 3, 2006)). However, in some instances, when the circumstances provide enough evidence of fraudulent intent, courts have found that denial of discharge is appropriate on summary judgment. See Hines v. Marchetti, 436 B.R. at 169, aff'd, 418 F. App'x 797 (11th Cir. 2011)(citing In re Heraud, 410 B.R.

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ORDER

The Motion for Summary Judgment is ~~granted~~

ORDERED DENIED.

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