U.S. BANKRUPTCY COURT
District of South Carolina

Adv. P. Number: 08-80215-dd

ORDER REVOKING DISCHARGE

The relief set forth on the following pages, for a total of 13 pages including this page, is hereby **ORDERED**.

FILED BY THE COURT
06/04/2009

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

Entered: 06/04/2009

US Bankruptcy Court Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re: Daniel Ray Vidis, Debtor.	Case No. 08-03242-dd Chapter 7
W. Clarkson McDow, Jr., United States Trustee for Region Four, Plaintiff, v. Daniel Ray Vidis. Defendant.	Adv. P. No. 08-80215-dd

ORDER REVOKING DISCHARGE

THIS MATTER comes before the Court for trial on the complaint brought by W. Clarkson McDow, Jr., United States Trustee for Region Four, to revoke the discharge of the debtor, Daniel Ray Vidis, under 11 U.S.C. § 727(d)(1 - 2).[1] This order also disposes of a motion for summary judgment filed by Mr. Vidis. Based upon the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law.[2]

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[1] Further reference to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, will be by section number only.

[2] To the extent that any Findings of Fact constitute Conclusions of Law, they are adopted as such. Additionally, to the extent that Conclusions of Law may constitute Findings of Fact,

FINDINGS OF FACT

The parties stipulated to the following facts:

1. Daniel Ray Vidis (Mr. Vidis) is domiciled in the State of South Carolina. Mr. Vidis filed a voluntary petition for chapter 7 relief on May 30, 2008, initiating the present bankruptcy case. On the date that Mr. Vidis filed for bankruptcy relief, he filed with the Bankruptcy Court under penalty of perjury a Schedule B - Personal Property claiming that on the date of filing he had cash in his possession and in his financial accounts totaling $254.00.

2. Within nine days prior to filing for bankruptcy relief, Mr. Vidis withdrew a total of $5,000.00 in cash from his checking account in five $1,000.00 increments.

3. At the time Mr. Vidis filed for bankruptcy relief, he had funds in his checking account totaling more than $254.00. Mr. Vidis also had in his possession at least $3,000.00 in cash of the approximately $5,000.00 in cash that he had withdrawn from his checking account. Mr. Vidis did not report to the Court or to the chapter 7 trustee that he had more than $254.00 until he filed amended schedules with the Court on September 23, 2008.

4. On the date that Mr. Vidis filed for bankruptcy relief, he filed with the Bankruptcy Court under penalty of perjury a Schedule B - Personal Property claiming that on the date of filing he had no interest in any tax refund. On the date that Mr. Vidis filed for bankruptcy relief, he was due a federal tax refund of $9,388.96, resulting from a tax return for 2006 filed jointly with his then estranged spouse, Andrea Vidis. Mr. Vidis' spouse paid little or no taxes for the year 2006. Mr. Vidis received the refund on or about July 1, 2008, and on or about July 11, 2008, he transferred one-half of the refund to his spouse. Mr. Vidis spent the remaining portion of the

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they are so adopted.

refund. He did not report to the Court or to the chapter 7 trustee his receipt or ownership of the refund or the transfer to his estranged spouse until September 23, 2008, when he filed amended schedules with the Court.

5. The monies in Mr. Vidis' checking account, the $3,000.00 cash on hand, and the $9,388.96 tax refund receivable constituted property of his bankruptcy estate.

6. Within days before filing for bankruptcy relief, Mr. Vidis paid $5,725.00 by check to his spouse, who was living in Maryland at the time, for what he believed was her share of the couple's 2007 tax refund, and he also paid $2,200.00 in cash as a retainer to his divorce attorney, Sherry Stoney. On the date that Mr. Vidis filed for bankruptcy relief, he filed with the Bankruptcy Court under penalty of perjury a Statement of Financial Affairs. The two transfers were not revealed in the original Statement of Financial Affairs. Mr. Vidis filed an amended Statement of Financial Affairs on September 23, 2008, reflecting these prepetition transfers.

7. At the meeting of creditors, Mr. Vidis acknowledged the receipt of his 2007 income tax refund in the sum of over $11,000 on the eve of bankruptcy. When asked by the trustee regarding the disposition of the refund, Mr. Vidis replied:

> My wife took over half of it and then I paid off some smaller bills, like J. C. Pennys, that was under a thousand dollars and some other bills.

8. On February 23, 2009, this Court entered an order denying Mr. Vidis' claim of exemptions in certain property. The order contains the following language:

> [E]ither intentionally or with reckless disregard for the truth, failed to disclose to the Court and to the Chapter 7 Trustee his cash, bank account funds, and tax refund receivable. Debtor's admission that he had at least $3,000 in cash at the time of filing while scheduling zero dollars of cash on hand evidences his reckless disregard for the truth. At a minimum, Debtor has failed to meet his disclosure

> obligations. Debtor's established pattern of making cash withdrawals and keeping the money on hand is evidence of his intent to conceal assets. The Debtor either intentionally or with reckless disregard for the truth, failed to disclose assets of the bankruptcy estate.
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> Order, page 6.

The time to appeal the Court's order has expired. This order also required Mr. Vidis to turnover the sum of $13,611.56 to the chapter 7 trustee. Mr. Vidis has not complied with the Court's order.

Based upon the evidence presented at trial, the Court makes the additional findings of fact.

9. Mr. Vidis had $1,222.60 in his joint bank account with Mrs. Vidis at the time of the petition filing which he either intentionally concealed from the trustee, or, failed to disclose due to a reckless disregard for the truth. This amount is calculated as follows:

$6.607.23 (joint account balance on hand at the date of filing)
($5,130.63) (military pay received early)
($254.00) (amount originally disclosed in Schedule B)
$1,222.60

10. Mr. Vidis had at least $3,000.00 in cash in his personal possession at the time of filing which he had accumulated by making the five withdrawals prior to filing for bankruptcy relief. Mr. Vidis either intentionally concealed this cash from the trustee, or, he failed to disclose this sum as a result of his reckless disregard for the truth.

11. Mr. Vidis intentionally failed to disclose his entitlement to or interest in a 2006 federal tax refund in the amount of $9,388.96 which he received post-petition and deposited in his joint bank account on July 7, 2008. Within one week after depositing the refund check, Mr. Vidis made personal withdrawals of $1,000.00, paid $960.00 in support to his estranged wife, and

allowed his wife to be paid $4,637.50, one-half of the tax refund through the cashing of a check which he had given to her to hold prepetition pending receipt of the refund. Mr. Vidis either intentionally concealed this refund from the trustee, or, he failed to disclose the refund as the result of his reckless disregard for the truth.

CONCLUSIONS OF LAW

I. Summary Judgment

A court may only grant summary judgment in favor of the moving party if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) [Fed. R. Bankr. P. 7056]. A court must view evidence in a light most favorable to the non-moving party. The moving party has the initial burden of showing that there is no genuine issue as to any material fact. A material fact is one that affects the outcome of the proceeding. *Campbell v. Nester (In re Rodwell Pontiac Cadillac GMC Truck, Inc.)*, 1996 WL 33340743 (Bankr. D.S.C. March 13, 1996).

Mr. Vidis moves for summary judgment arguing that his statement at the meeting of creditors regarding his prepetition receipt of the 2007 federal tax refund placed the UST on notice that the UST should investigate Mr. Vidis. The UST argues that accepting the statement at face value would at best put the UST on reasonable notice only of the undisclosed transfer of one-half the 2007 refund to his spouse. The UST contends that Mr. Vidis' statement bears no relationship to his false statements regarding his cash on hand, his bank account balance, or his interest in and eventual receipt of the 2006 federal tax refund receivable. The Court agrees. A genuine issue of material fact existed as to whether the UST exercised proper due diligence on or

before September 2, 2008, in evaluating Mr. Vidis' entitlement to a discharge. As noted below, that issues was resolved in the UST's favor through the presentation of evidence at trial.

II. Revocation of Discharge

In order to revoke Mr. Vidis' discharge under § 727(d)(1 - 2), the UST must show by a preponderance of the evidence that Mr. Vidis (1) obtained his discharge by fraud by concealing bankruptcy estate assets and/or by making false oaths or accounts; or, (2) fraudulently failed to deliver or to report the acquisition of estate property. The UST must also show that he was not on reasonable notice of Mr. Vidis' fraudulent conduct or reckless actions until after September 2, 2008.[3]

a. Revocation Prior to Entry of Discharge

Section 727(d) precludes a party in interest from seeking revocation of a discharge if it had knowledge of the disqualifying act before entry of the discharge. A party has sixty (60) days from the date set for the Meeting of Creditors in which to file an objection to discharge. Once the sixty (60) day deadline has passed, Rule 4004(c) provides that "the court shall forthwith grant the discharge." Busy bankruptcy courts do not to grant a discharges immediately after the sixty (60) days. A "gap period" thus exists.

When faced with an action for the revocation of discharge during this "gap period," the majority of courts have determined that Congress did not intend §727 to provide a period of immunity for dishonest debtors. *See, e.g., Citibank v. Emery*, 132 F.3d 892, 896; *In re Dietz*, 914

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[3] Although not pled in his amended complaint, the UST argued at trial that a third ground exists for revoking Mr. Vidis' discharge: § 727(d)(3), the failure to obey a lawful order of the court - the turnover order. Mr. Vidis does not dispute that he has failed to obey the Court's February 23, 2009, order. The Court will not entertain this issue at present.

(F.2d 161, 164 (9th Cir. 1990) (finding the court acted "consistently with the spirit of the bankruptcy rules," which contemplate immediate discharge after a bar date); *In re Stevens*, 107 B.R. 702, 706 (9th Cir. BAP 1989) (holding "the rights of parties ... would be unreasonably frustrated, if Rule 4004 were read to create a temporary period when no ... complaint under §727 could be brought"); *In re Staub*, 208 B.R. 602, 606-07 (Bankr. S.D. Ga. 1997) (holding "rational sense" requires that there be no "safe haven gap period"). "Sections 727(c) and 727(d), taken together clearly contemplate that diligent creditors will have a remedy against fraudulent debtors." *Emery*, 132 F.3d at 896. Therefore, when discharge has not been entered "forthwith" and knowledge of the fraud is discovered after the bar date but before the discharge order is entered, the discharge date should be imputed back to the bar date so that the court's ministerial delay in granting a discharge does not create an unintended period of immunity for fraudulent debtors. *Id.* at 894.

In this case, Mr. Vidis' Meeting of Creditors was held on July 1, 2008. Accordingly, the bar date for objection to discharge was August 30, 2008. In order to prevent the Court's ministerial delay in granting the discharge from creating a period of immunity for Mr. Vidis' fraudulent actions, the discharge date should be and is imputed to September 2, 2008. The UST may maintain his action to revoke the Mr. Vidis' discharge even though the discharge order has yet to be entered.

b. Reasonable Notice - Fraudulent or Reckless Conduct

If a § 727 plaintiff is in possession of facts which would put a reasonable person on notice of a possible fraud by a debtor, that party has a duty to diligently investigate the facts to

determine if grounds exists to deny the debtor's discharge. If grounds to deny discharge exist, that party must timely file a discharge complaint. *Anderson v. Vereen*, 219 B.R. 691, 696, (Bankr. D.S.C. 1997) (chapter 7 trustee's action to revoke the debtor's discharge under § 727(d)(1) dismissed where the trustee informed the court two weeks prior to the discharge deadline that he was considering a § 727 action and that the debtor might be engaged in civil and criminal misconduct). A party seeking to revoke or prevent a debtor's discharge under § 727(d)(1) must "show due diligence in investigating and responding to possible fraudulent conduct once he or she is aware of it or is in possession of facts that a reasonable person in his or her position should have been aware of it or is in possession of facts such that a reasonable person in his or her position should have been aware of a possible fraud." *Peagler v. Peagler*, 2001 WL 1806976, page 7 (Bankr. D.S.C. June 1, 2001). The plaintiff in a discharge revocation action has the burden of showing that knowledge of the fraud did not occur until after the time for objecting to the discharge has expired. *Anderson*, 219 B.R. at 694.

Mr. Vidis contends that the UST's case should fail because the UST did not properly react to Mr. Vidis' response at the meeting of creditors to the trustee's question regarding his tax refund. The Court disagrees. The UST alleged in the amended complaint and proved at trial the following fraudulent conduct by Mr. Vidis:

1. "had in his checking account and at his disposal a minimum of $1,476.00" ¶ 12;
2. "had in his possession at least $3,000.00 in cash" ¶ 12;
3. "was due a federal tax refund of $9,388.96, resulting from a tax return for 2006 filed jointly with his then estranged spouse" ¶ 13;
4. "received the [2006] refund on or about July 1, 2008, and on our about July 11, 2008, he transferred one-half of the refund to his estranged spouse" ¶ 13; and

There is no rational nexus between Mr. Vidis' statement at the meeting of creditors and each fraudulent or reckless act alleged by the UST. Mr. Vidis' statement that he spent his entire tax 2007 refund prepetition, that his wife "took over half of it," did not place the UST on notice of other fraudulent acts. The evidence shows that the UST was not on notice that Mr. Vidis was engaged in deception and fraud regarding his cash on hand, financial account balance, or entitlement to a 2006 tax refund until it received responses to discovery requests made in a § 707(b) action when Mr. Vidis produced bank account documents which revealed his deception. The discovery production occurred after September 2, 2008, the deadline for objection to Mr. Vidis' discharge.

Mr. Vidis' statement served only to inform the UST and the chapter 7 trustee that the 2007 tax refund had been spent, and perhaps, that he had made preferential payments to certain creditors or possibly that his spouse had taken more than her fair share of the refund. Neither the potential preferential transfers or overpayment to the spouse regarding the refund would constitute fraud so as to place the UST on notice that Mr. Vidis' was concealing bankruptcy estate property. Assuming that Mr. Vidis' statement placed the UST on notice of a false statement regarding prepetition payments to creditors, this statement does not otherwise place the UST on notice of the other misconduct in the case.

Mr. Vidis testified at his deposition on October 28, 2008, that the statement upon which his defense relies was intended to convey information *only* regarding the 2007 refund - not the 2006 refund as he now argues.

> UST: So that never occurred to you that when he asked you about your 2007 return that you had a 2006 owing?

MR. VIDIS: No sir.

UST: Okay. So while Mr. Hovis was questioning you, that never popped into your head that, maybe I should tell him about the 2006 tax refund that I haven't gotten yet?

MR. VIDIS: No, sir.

[Transcript, deposition, October 28, 2008, p. 92, lines 11 - 19].

The UST did not have notice of the false statements or concealment prior to the bar date for a discharge complaint and has met his burden of proof on this issue.

c. § 727(d)(1) - Discharge Obtained by Fraud

The UST's first cause of action seeks revocation of discharge under § 727(d)(1) based upon Mr. Vidis' having obtained his discharge by fraud. Having found that Mr. Vidis fraudulently, or, with reckless disregard for the truth, concealed his true bank account balance on the petition date, his interest in a 2006 federal tax refund, and the cash he had in his personal possession, the Court concludes that grounds exist to revoke Mr. Vidis' discharge. Mr. Vidis argues that the Court should exercise its discretion in order to "rehabilitate" Mr. Vidis by granting relief short of denial of discharge. Accuracy, honesty, and disclosure are critical to the bankruptcy system and process, and inherent in the bargain for a discharge. *See In re Simpson*, 306 B.R. 793 (Bankr. D.S.C. 2003). The assets not properly disclosed by Mr. Vidis were material to the administration of his bankruptcy case.

d. § 727(d)(2) - Fraudulent Failure to Report and Deliver Estate Property

The UST's second cause of action seeks revocation of discharge under § 727(d)(2), based upon Mr. Vidis' receipt of and failure to report or to surrender to the chapter 7 trustee - the 2006 federal tax refund of $9,388.96 - a material asset of the bankruptcy estate. The refund was property of the estate and was received by Mr. Vidis post petition. Mr. Vidis did not turn this property over to the trustee. Mr. Vidis failed to disclose the existence of the refund on his bankruptcy schedules and he continued a pattern of making cash withdrawals to conceal the money. This conduct imputes a fraudulent intent to Mr. Vidis that was not rebutted at trial.

CONCLUSION

Mr. Vidis' discharge should be and hereby is revoked under § 727(d)(1 - 2).

AND IT IS SO ORDERED.