

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
atO'clock &min.....M
JUN 15 2000
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (3)

IN RE:

Brian James Filter,

Debtor.

Francis W. Adams, Jr., D.M.D.

Plaintiff,

v.

Brian James Filter,

Defendant.

C/A No. 99-04462-W

Adv. Pro. No. 99-80370-W

ENTERED
JUN 16 2000
V. L. D.

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Francis W. Adams, Jr. D.M.D.'s Motion for Summary Judgment is granted, and Brian James Filter is denied a discharge pursuant to 11 U.S.C. §727(a)(2)(A). Furthermore, the Court dismisses Brian James Filter's counterclaim alleging that in the event he had been granted a discharge, the Court should have required Francis Adams to release an assignment of a life insurance.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
June 15, 2000.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

JUN 16 2000

All creditors in main case
DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

VANNA L. DANIEL

Deputy Clerk

Wachter
Gray
Harvey

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ORDER

Chapter 7

THIS MATTER comes before the Court upon Francis W. Adams, Jr., D.M.D.'s ("Plaintiff") Motion for Summary Judgment filed on May 16, 2000. Brian James Filter ("Defendant" or "Debtor") filed a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment ("Objection to Motion") on May 30, 2000.¹ Plaintiff's Complaint Objecting to Discharge, filed with the Court on October 21, 1999, alleges that Defendant should not be granted a discharge pursuant to 11 U.S.C. §727(a)(2)(A)² because he made certain transfers of assets within one year of the filing of his voluntary petition for relief. Furthermore, Plaintiff brought this action seeking to bar Debtor's discharge pursuant to §727(a)(2)(4)(A), alleging that Defendant made a false oath to this Court by failing to disclose the subject transfers

¹ The Court notes that Defendant's Objection to Motion was untimely. The Court's Order Setting Pretrial Date and Fixing Dates to file Motions and Discovery, entered on March 15, 2000, specified that "[a]ny objections or other responses to motions shall be filed and served on or before May 25, 2000." However, due to Plaintiff's failure to raise the untimeliness of the objection, the Court has not considered it in making its determination of whether to grant Plaintiff's Motion.

² Further references to the Bankruptcy Code shall be by section number only.

on his Statement of Affairs submitted with his voluntary petition. Defendant's reply to the Complaint included a counterclaim alleging that in the event Defendant was granted a discharge, the Court should require Plaintiff to release an assignment of a life insurance Defendant had given to Plaintiff as additional security for his debt.

After considering the pleadings in the adversary proceeding, the affidavits and evidence presented in support of the Motion and objection thereto, and the arguments of counsel at the hearing on the Motion; the Court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52, made applicable by Fed. R. Bankr. P. 7052.³

FINDINGS OF FACT

1. On or about March 28, 1990, Plaintiff sold his dental practice in Conway, South Carolina, to Defendant and owner-financed the transaction.
2. Defendant leased Plaintiff's office building pursuant to a Lease Agreement entered into on March 28, 1990. The term of the Lease Agreement was five years beginning on July 1, 1990 and ending June 30, 1995.
3. Defendant gave Plaintiff two promissory notes in connection with the sale of the dental practice. The first promissory note was dated March 28, 1990 and was in the principal amount of \$276,750.00, with interest from the date of possession of the practice. The second promissory note, for the purchase of Plaintiff's accounts receivable, was in the principal amount of \$35,234.99.

³ The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

4. On February 28, 1992, the parties amended the notes to consolidate the debts and combine the principal, interest, and repayment requirements. According to the Amendments of Promissory Notes, the entire outstanding principal balance in the amount of \$225,000.00 was to be paid according to the following schedule: (1) \$50,000 due upon execution and receipt of the Amendment to Promissory Notes; (2) \$25,000 due over the next 60 day periods beginning 30 days from the signing of the note and payable at an interest rate of 10 percent; and (3) \$150,000.00 due and payable on or before February 10, 1997.

5. On February 28, 1992, the parties also entered into an Amendment to Lease Agreement which extended the lease until February 28, 1997.

6. On or about August 12, 1996, Defendant purchased a lot in Burning Ridge Medical Park for \$65,000.00 and financed the purchase with a loan from Conway National Bank, secured by a mortgage on the lot.

7. On October 29, 1996, Defendant wrote Plaintiff to inform him of his purchase of the lot at the Burning Ridge Medical Park and to further inform him of his intentions to build his own office. The letter also informed Plaintiff of Defendant's financial difficulties and stated that he had unsuccessfully attempted to obtain financing from other lenders and could not make the balloon payment due on the note.

8. On November 18, 1996, Defendant wrote Plaintiff reiterating his inability to pay and emphasizing the fact that he had "debts which far exceed[ed] [his] assets." The letter proposed to Plaintiff the possibility to renegotiate Defendant's obligations, whereby Conway National Bank would lend Defendant \$150,000.00, the amount of the balloon payment on two contingencies: First, the loan was to be co-signed by Plaintiff himself. Second, the proceeds of the loan were to be deposited in a CD at Conway National Bank. As an alternative to Plaintiff not getting paid,

Defendant offered Plaintiff a choice of co-signing a note with Defendant so that the debt could be satisfied.

9. Defendant ultimately defaulted on the terms of his agreements with Plaintiff; therefore, Plaintiff took Defendant to Arbitration to enforce the contracts. The arbitration proceedings were held on June 18 and 19, 1998. An order was entered on July 29, 1998, holding that Defendant and his professional corporation were jointly and severally liable to Plaintiff for the sum of \$170,722.04, along with interest at the legal rate of 8-3/4 percent from June 18, 1998, and attorney's fees of \$21,478.05. Defendant was also found to be in breach of the Lease agreement, and it was found that Defendant's professional corporation had become a month-to-month tenant.

10. Sometime after the hearing of the arbitration but prior to the Order being entered by the arbitration panel, Defendant discussed the pending arbitration decision with Jeff Golobisky, a friend and one of the arbitrators, and was informed that the outcome would be adverse to his interests.

11. Jack L. Green, Jr. ("Green") is an orthodontist who practices in Horry County. Green relied on Defendant's frequent referrals; thus, it was in his personal interest to see Defendant remain in business.

12. On July 17, 1998, Defendant sold the lot at Burning Ridge Medical Center to Green for \$64,644.42, the payoff on the debt secured by the mortgage with Conway National Bank. Green financed the purchase of the lot with a mortgage loan from Carolina First Bank.

13. Internal underwriting documents from Carolina First reflect that the lot was valued at approximately \$100,000.

14. Green and Defendant had orally agreed that Green would obtain mortgage financing to build an office for Defendant's dental practice on the Burning Ridge Medical Center lot.

Defendant intended to occupy the finished building on a lease-purchase basis. All Green expected out of the arrangement was to get his out-of-pocket expenses back. Pursuant to the oral agreement between the parties, Defendant would pay all costs associated with construction, including interest on the construction loan, insurance, and taxes; Green would have no out-of-pocket expenditures. Furthermore, the understanding between the parties was that when Defendant would be able to buy the office back, Green would sell it to him for a good price.

15. An appraisal of the Burning Ridge Medical Center lot conducted on or about August 12, 1998, valued the property, in its unfinished state, at \$95,000.

16. Defendant contacted Aubrey Batson, d/b/a Tobyco, of Gaston, South Carolina, to construct the office building. On August 5, 1998, Batson gave his initial quote to Defendant; however, he later changed the construction contract to reflect that Green was the owner of the property in question.

17. Green opened a construction checking account at Peoples Federal Bank to fund direct deposits of all construction drawn. The checking account was in his name, as well as Aubrey N. Batson, and Diane M. Filter's name. Diane M. Filter is Defendant's wife. Her name remained as an authorized signatory on the construction checking account until she requested a construction loans officer at Peoples Federal Bank, by letter dated February 24, 2000, that her name be removed.

18. An appraisal which was conducted on Debtor's residence by Pee Dee Coastal Appraisals on July 13, 1998, in conjunction with the refinancing of Defendant's home, valued the residence at \$242,000.

19. On July 24, 1998, Defendant closed a refinance of the mortgage on his residence, borrowing \$217,800, of which \$28,613.54 was paid to many of Debtor's unsecured creditors.

Defendant did not give Plaintiff any of the proceeds of the refinance to satisfy the indebtedness to him.

20. Between 1990 and 1998, Defendant borrowed money from his parents, Paul and Lois Filter, on two occasions. On July 30, 1998, Defendant gave a second mortgage lien on his and his wife's residence in favor of his parents in the principal sum of \$24,200.

21. On August 4, 1998, Diane Filter wrote two checks totaling \$20,000.00 out of a joint account at the Conway National Bank she owned with her husband. One of these checks was written to "Cash" and one check was made payable to Coastal Federal designated to open a new account. On August 7, 1998, Diane Filter wrote two checks on the same joint bank account payable to Charles Schwab and Company to the accounts of Debtor's adult children, Joshua Filter and Alicia Filter, their children, totaling \$2,950.00.

22. On September 8, 1998, Plaintiff began proceedings to collect his arbitration award, which included claim and delivery of equipment and eviction from the leased premises.

23. Defendant filed his voluntary petition for relief under Chapter 7 of the Bankruptcy Code on May 25, 1999. Filter omitted his transactions with Green and with his parents from his schedule of assets and also failed to include these transactions in his answers to Question 10 of his Statement of Financial Affairs which he signed under penalty of perjury.

24. On June 18, 1999, Debtor amended his response to question 10 on the Statement of Financial Affairs to reflect the transfer of the Burning Ridge Medical lot to Green.

25. On August 6, 1999, Debtor amended Schedule F by adding Southeastern Health Plus and Rehabicare as creditors; and, on August 17, 1999, he once again amended Schedule F to add Citibank and an unsecured creditor.

26. On August 31, 1999, Plaintiff, through his counsel, filed a Motion for Extension of Time

in Which to Object to Discharge.

27. On September 14, 1999, Debtor amended his response to question 10 on the Statement of Financial Affairs to refinancing of Defendant's residence, as well as the second mortgage which was executed on July 29, 1998.

CONCLUSIONS OF LAW

A. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings pursuant to Fed. R. Bankr. P. 7056, provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." The Court should grant summary judgment "against a party who fails to make a showing sufficient to establish the evidence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Fort Jackson Fed. Credit Union v. Wicker (In re Wicker); C/A No. 99-070108-W; Adv. Pro. 99-80392-W (Bankr. D.S.C. 05/24/2000) (quoting Hotel Assoc. v. Hyatt Corp. (In re Dunes Hotel Assoc.), 194 B.R. 967, 976 (Bankr. D.S.C. 1995)). No genuine issue for trial exists unless the non-moving party has presented sufficient evidence in his or her favor so that a jury could return a verdict for that party; however, if the evidence is not particularly probative and relies on speculations, summary judgment may be granted. See Glover v. Lockheed Corp., 772 F. Supp. 898, 904 (D.S.C. 1991).

The movant has the initial burden to show that the non-movant "has failed to establish an essential element of a claim and the absence of any genuine issue of material fact"; however, once the movant meets that burden, it then shifts to the non-movant "to point out specific facts

showing that a genuine issue exists for trial.” Fort Jackson Federal Credit Union v. Wicker (In re Wicker); C/A No. 99-070108-W; Adv. Pro. 99-80392-W (Bankr. D.S.C. 05/24/2000) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)).

B. Causes of Action Pursuant to §727

Plaintiff’s First Cause of Action is based on §727(a)(2)(A). In the Complaint, Plaintiff alleges that Debtor made certain transfers of assets within one year of the filing of his voluntary petition for relief under Chapter 7. More specifically, Plaintiff asserts that Debtor did the following: (1) sold a commercial lot in Horry county worth approximately \$95,000 for \$64,644.42 to a colleague, Green; (2) refinanced his personal residence, paying over \$28,000.00 to unsecured creditors to the exclusion of Plaintiff; (3) gave a second mortgage on his personal residence for \$24,200.00 to his parents as security for an antecedent debt, effectively consuming any nonexempt equity in the property; and (4) issued checks to family members in excess of \$25,000.

Section 727(a)(2)(A) provides:

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.

To state a claim under this cause of action, Plaintiff must show four things: (1) that the act under scrutiny occurred during the one year period prior to the bankruptcy filing; (2) that the act was done with the actual intent to hinder, delay, or defraud creditor or the trustee; (3) that the debtor

or his duly authorized agent was the actor; and (4) that the act in question consisted of either transferring, removing, destroying, or concealing debtor's property. See, e.g., Painewebber Inc. v. Gollomp (In re Gollomp), 198 B.R. 433, 439-40 (S.D.N.Y. 1996); Barthlow v. More (In re More), 138 B.R. 102, 104 (Bankr. M.D. Fla. 1992).

A debtor's intention to fraudulently conceal assets for the estate may be based upon circumstantial evidence or upon inferences drawn from a course of conduct. See, e.g., Riggs Nat'l Bank v. Andrews (In re Andrews), 186 B.R. 219, 222 (Bankr. E.D. Va. 1995) (quoting In re Warner, 87 B.R. 199, 202 (Bankr. M.D. Fla. 1988)) ("Because proof of actual intent of fraudulent transfers to hinder, delay or defraud creditors is often unavailable through direct evidence, courts have traditionally relied upon certain well-defined badges or indicia of fraud to presume fraudulent intent."); see also Siegel v. Weldon (In re Weldon), C/A No. 94-71548; Adv. Pro. 94-8182-W (Bankr. D.S.C. 06/05/1995); Friedman v. Kaiser (In re Kaiser), 94 B.R. 779, 780 (Bankr. S.D. Fla. 1988) ("The intent necessary to deny a debtor's discharge to hinder, delay or defraud a creditor may be based upon circumstantial evidence or inferences drawn from the course of conduct."). Due to the fact that debtors do not usually admit to having fraudulently transferred or concealed property, courts may infer such fraudulent intentions from the following "badges of fraud": "(1) Relationship between the debtor and the transferee; (2) Lack of consideration for conveyance; (3) Debtor's insolvency or indebtedness; (4) Transfer of debtor's entire estate; (5) Reservation of benefits, control or dominion by the debtor; (6) Secrecy or concealment of the transaction; and (7) Pendency or threat of litigation at the time of transfer." Riggs Nat'l Bank v. Andrews (In re Andrews), 186 B.R. 219, 222 (Bankr. E.D. Va. 1995); Siegel v. Weldon (In re Weldon), C/A No. 94-71548; Adv. Pro. 94-8182-W (Bankr. D.S.C. 06/05/1995); see also Painewebber Inc. v. Gollomp (In re Gollomp); 198 B.R. 433, 440 (S.D.

N.Y. 1996); Barthlow v. More (In re More), 138 B.R. 102 (Bankr. M.D. Fla. 1992).

In this case, the Court finds that the badges of fraud weigh in favor of finding that Debtor transferred property with the actual intent to hinder, delay, or defraud creditors. As to the insolvency of Debtor, his letter dated November 18, 1996 expressly informed Plaintiff that Defendant's debt far exceeded his assets. Diane Filter corroborated her husband's statement of insolvency made to Plaintiff in the letter and testified that his financial situation continued to worsen through July of 1998. By transferring the Burning Ridge Medical Park lot to Green and by refinancing and executing a second mortgage on his residence, Defendant transferred the only valuable assets he owned for inadequate consideration. The Court notes that the sale of the lot to Green was for approximately \$30,000 below the appraised value. Furthermore, the mortgage on his residence was executed to pay antecedent debts to his parents. When considering the relationship between the parties involved in the transfer, the Court also finds that the transfers were to someone of a close relationship. Green was a long-time business associate who counted on Defendant's referrals for continued income and, following the sale of the lot, Defendant retained the possession and use of both properties in question after the transfers. The second mortgage, executed to repay some debts incurred between 1990 and 1998, ultimately benefitted his parents. Lastly, the transfers were made soon after Defendant had learned from his friend, who was an arbitrator in his case, that the outcome did not look favorable to Defendant. Therefore, the Court finds that the facts indicate a plan by Defendant to avoid paying his debt to Plaintiff. Defendant's overall scheme was to transfer his most valuable assets to people with whom he had a close relationship, and in particular to transfer the Burning Ridge Medical Park lot to one of his colleagues so that he could build an office for his dental practice with the possibility of buying it back for a good price when his financial situation improved.

In the Complaint and at the hearing on the Motion, Plaintiff asserted that one of the subject transfers involved Defendant's issuing of checks to his wife and children in excess of \$25,000. At the hearing, Defendant argued that the transfer of money to family members was not in an attempt to defraud creditors; rather, Defendant dismissed the alleged fraud in conjunctions with those transfers by explaining that Defendant's wife and children were employed by Defendant's dental practice and that payments by check represented wages and salary earned. Even though a genuine issue of material fact may exist as it relates to the transfer of Defendant's money to his wife and children, no genuine issue of material fact exists for the other transfers in question. The Court finds that, when considering the "badges of fraud," they weigh in favor of finding that Defendant's transfer of the Burning Ridge Medical Park lot and the execution of the second mortgage on the residence were for the actual purpose of defrauding his creditors. Therefore, the Court grants summary judgment in favor of Plaintiff as it relates to the cause of action under §727(a)(2)(A).

Plaintiff also sought to bar Debtor's discharge pursuant to §727(a)(2)(4)(A), alleging that Defendant failed to disclose the subject transfers on his Statement of Affairs.⁴ The original Statement of Financial Affairs failed to reflect the transfers at issue in this case. Defendant subsequently amended the Statement of Financial Affairs on June 18, 1999 and once again

⁴ While at the hearing on the Motion Plaintiff asserted that the second count alleged in the Complaint was for a determination on non-dischargeability pursuant to §727(a)(4)(A), the Complaint actually reflects that the second count is based on allegations pursuant to §727(a)(2)(B) and (a)(3) and further asserts that Defendant concealed books, documents, records and papers from which his financial condition or business transactions might have been ascertained. The Complaint was never amended to correct the discrepancies in code sections. The Court notes that even though Plaintiff was mistaken in basing the second count in the Complaint on the wrong subsection of §727, thus raising the question of whether this cause of action should be considered at all, the Court's final holding is not altered by this discrepancy and Debtor is ultimately denied a discharge pursuant to §727(a)(2)(A).

September 14, 1999, following the filing of Plaintiff's Motion for Extension of Time in Which to Object to Discharge. At the hearing on the Motion, Defendant explained that the omissions from the original documents were the result of an oversight on the part of Defendant's bankruptcy attorney.⁵ The Court notes that, even though an issue of material fact may exist as it relates to this cause of action, Defendant's discharge is ultimately barred by §727(a)(2)(A). It is therefore,

ORDERED that Francis W. Adams, Jr., D.M.D.'s Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that Brian James Filter is denied a discharge pursuant to §727(a)(2)(A).

IT IS FURTHER ORDERED that Brian James Filter's Counterclaim is dismissed.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina

June 15, 2000

⁵ The Court notes that Defendants did not submit any Affidavit or other sworn testimony by their bankruptcy attorney stating that the attorney was responsible for the omissions in the original schedules and Statement of Financial Affairs.