

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED

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DIST OF SOUTH CAROLINA

Case No. 98-06393-W

Adversary No. 99-80003

IN RE:

Rovenia M. Williams, f/k/a Rovenia M.
Griffith,

Debtor.

Robert F. Anderson, Trustee,

Plaintiff,

v.

Rovenia M. Williams, f/k/a Rovenia M.
Griffith,

Defendant.

JUDGMENT

ENTERED

MAR 03 1999

V. L. D.

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order, the Debtor's discharge is revoked, and her claimed exemption in the retirement fund is denied.



JOHN E. WAITES
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina

March 1, 1999

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:

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to all crs via
BNC

Griffin Defendant Jgmt Index

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

VANNA L. DANIEL

Deputy Clerk

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Case No. 98-06393-W

Adversary No. 99-8000

ENTERED

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V.L.D.

ORDER

Chapter 7

This matter comes before the Court for trial on the complaint of the Trustee, Robert F. Anderson, to revoke the discharge of the Debtor, Rovenia M. Williams, pursuant to 11 U.S.C. Section 727(d) and to deny her claimed exemption in a retirement fund. Based upon the testimony and the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on July 14, 1998. At that time, she filed Schedule B - Personal Property which was declared by her to be true and correct under penalty of perjury. The Debtor had the assistance of an attorney in preparing her Schedules. Schedule B indicated that the Debtor had no interest in any IRA, ERISA, KEOGH or other pension or profit sharing plan. On August 24, 1998, the Meeting of Creditors was held pursuant to 11 U.S.C. Section 341. The Debtor attended the Meeting and testified under oath that

the Schedules she had filed were correct. The last day to object to the Debtor's discharge was October 26, 1998.

In fact, the Debtor owned an interest in a pension plan at the time she filed her Petition. The Debtor was an employee of Fayetteville State University in North Carolina for approximately thirteen years. When she was hired, she automatically became eligible for the Employee Retirement Plan. Her retirement benefits were explained verbally and in writing in an employee handbook. The Debtor was paid monthly. Each month a deduction was made from her paycheck for her contribution to her retirement plan. Once or twice a year, the Debtor was given a report on the status of the plan. The Debtor resigned from Fayetteville State University on May 14, 1998. She moved to South Carolina and filed her Bankruptcy Petition on July 14, 1998.

Approximately one month after the Meeting of Creditors, on September 28, 1998, the Debtor opted to cash out her retirement plan and executed an application for refund of retirement contributions. The application was submitted to the Department of State Treasurer of the State of North Carolina on October 14, 1998. The Debtor did not advise the Trustee of her interest in the pension plan or advise the Trustee of her application for a refund of retirement contributions.

On November 3, 1998, the Trustee received a letter from a creditor indicating that the Debtor was about to receive a retirement refund in the amount of \$15,316.02. This letter was the first indication to the Trustee that the Debtor had an interest in a retirement plan. The next day, November 4, the Trustee, acting through

his attorney, contacted the State of North Carolina Retirement System and the Debtor's attorney regarding the turnover of the proceeds of the retirement plan to the Trustee. On November 12, the Trustee received the net proceeds of the Retirement Plan in the amount of \$12,252.82.

After being advised by the Trustee of his discovery of the pension plan and his claim to its proceeds, on November 10, 1998, the Debtor filed an Amended Schedule B which indicated she was the owner of the pension plan. She also claimed the pension plan to be exempt from creditors' claims pursuant to S.C. Code Section 15-41-30(10)(e). The Trustee brought this action shortly thereafter.

The Debtor appears to be an intelligent, well-educated person. She received a college degree in business administration from Fayetteville State University. She worked in the admissions office at that University for thirteen years.

At trial, the Debtor testified that she did not know that she had an interest in the retirement plan. However, this testimony was not credible. The Debtor was a long-term participant in the retirement plan. Her employment ended shortly before she filed bankruptcy. Shortly after the Meeting of Creditors, she attempted to cash out her interest in the retirement fund. If she truly was not aware of her interest in the retirement plan, then she would have not applied for the benefits. Also, the Debtor did not amend her Schedules until after the fund was discovered by the Trustee. If she had neglected to disclose her interest in the retirement plan in good faith, she would have amended her Schedules much earlier.

CONCLUSIONS OF LAW

The Trustee has requested that the Debtor's discharge be revoked pursuant to 11 U.S.C. Section 727(d). The Trustee has the burden of proof on all issues by a preponderance of the evidence. See, *Farouki v. Emirates Bank*, 14 F.3d 244 (4th Cir. 1994), and *In re Serafini*, 938 F.2d 1156 (10th Cir. 1991).

In order for the Debtor's discharge to be revoked, the Trustee must prove all the elements of Section 727(d), which provides as follows:

On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if -

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

The last day to object to the Debtor's discharge was October 26, 1998. It was not until November 3, 1998 that the Trustee received a letter from a creditor notifying him of the retirement fund. The Trustee did not have any knowledge or reasonable notice of the retirement fund prior to that time. See *In re Vereen*, 219 B.R. 691 (Bankr. D.S.C. 1998).

The Trustee must also show that the discharge was obtained through the fraud of the Debtor, including the intentional omission of assets from the Debtor's schedules. 6 *Collier on Bankruptcy*, 15 ed. rev., ¶ 727.152, page 727-70.3 (1998) provides as follows:

The fraud required to be shown is fraud in fact, such as the intentional omission of assets from the debtor's schedules. The fraud required to be shown must involve intentional wrong, and does not include implied fraud or fraud in law,

which may exist without the imputation of bad faith or immorality.

In the present case, it is the finding of the Court that the Trustee has met his burden of proof by the preponderance of the evidence in showing that the Debtor intentionally and fraudulently omitted her interest in the retirement fund from her Schedules.

The Trustee has also requested that the Debtor's claimed exemption in the retirement fund be denied on the grounds that she intentionally concealed the retirement fund from the Trustee. *In re Alphin*, Case No. 96-72207-W (Bankr. D.S.C., November 4, 1997), provides as follows:

Intentional concealment of estate property will bar the debtor from claiming such property as exempt, after it surfaces as an asset. See, e.g., Doan, 672 F.2d at 833; Calder v. Job (In re Calder), 973 F.2d 862, 868 (10th Cir. 1992). Intent to conceal is a factual determination to be made by a bankruptcy court, based upon the evidence presented and inferences drawn therefrom at trial. *In re Yonikus*, 996 F.2d at 872.

The Debtor intentionally and fraudulently concealed her interest in the retirement plan. Consequently, her exemption should be denied.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Debtor's discharge should be, and hereby is, revoked, pursuant to 11 U.S.C. Section 727(d)(1), and her claimed exemption in the retirement fund is denied.

AND IT IS SO ORDERED.

Columbia, South Carolina
March 1, 1999.


UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

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Griffin, Defendant

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

VANNA L. DANIEL

Deputy Clerk

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