

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: -

ADVERSARY PROCEEDING NO: 07-80114

Judgment

The relief set forth on the following pages, for a total of 2 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
04/28/2008



Entered: 04/28/2008

US Bankruptcy Court Judge
District of South Carolina

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

In re:

Duane David Ross,

Debtor.

Randy A. Skinner, Trustee,

Plaintiff,

v.

Duane David Ross,

Defendant.

Chapter 7

Case No. 06-01890-HB

Adv. Pro. No. 07-80114-HB

Adv. Pro. No. 07-80115-HB

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law as stated in the attached Order of the Court, judgment is granted in favor of Plaintiff on the causes of action alleged in the Complaints in the above-captioned adversary cases. Accordingly,

IT IS HEREBY ORDERED, that pursuant to 11 U.S.C. § 542(a), Duane David Ross shall promptly turnover to the Trustee the sum of \$16,660, which is property of the estate. Turnover shall be within thirty (30) days of entry of the attached Order.

IT IS FURTHER ORDERED, that after said thirty (30) days, if Ross has not complied with that Order, the Trustee may obtain a judgment against Duane David Ross in the amount of \$16,600, including appropriate interest, by the filing of an affidavit with the Court detailing the failure to pay and the requested amount, along with a proposed judgment.

IT IS FURTHER ORDERED that pursuant to 11 U.S.C. § 727(a)(2)(B) the discharge of Duane David Ross is denied.

U.S. BANKRUPTCY COURT
District of South Carolina

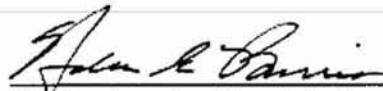
Case Number: -

ADVERSARY PROCEEDING NO: 07-80114

The relief set forth on the following pages, for a total of 9 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
04/28/2008




US Bankruptcy Court Judge
District of South Carolina

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

In re:

Duane David Ross,

Debtor.

Chapter 7

Case No. 06-01890-HB

Randy A. Skinner, Trustee,

Plaintiff,

v.

Duane David Ross,

Defendant.

Adv. Pro. No. 07-80114-HB

Adv. Pro. No. 07-80115-HB

ORDER

These cases came before the court for trial on Plaintiff/Trustee's Complaints alleging a cause of action pursuant to 11 U.S.C. § 542(a) for turnover of property of the estate (Case No. 07-80114-hb) and requesting that the court deny the debtor a discharge pursuant to 11 U.S.C. § 727(a)(2)(B) (Case No. 07-80115-hb). The trustee appeared at the trial through counsel, and the Defendant appeared *pro se*.

FINDINGS OF FACT

1. The court has jurisdiction over this subject matter of this proceeding and all parties hereto, venue is proper and this is a core proceeding under 28 U.S.C. § 157.
2. Duane David Ross filed for Chapter 7 protection in this court on May 4, 2006. At that time he was represented by attorney Kenneth G. Southerlin, Jr.

3. The following relevant facts are alleged in the Complaints and admitted in Ross's

Answers:¹

- a. On the petition date Ross was the owner of one third of the common stock or alternatively one third of an ownership interest in Two Day Appraisals, Inc.
 - b. Prior to and on the petition date it was the custom of the three owner/managers of that company to pay each manager a monthly or biweekly predetermined salary plus one third of the then available profits of the company on a monthly basis as a corporate distribution or dividend.
 - c. At the Section 341(a) meeting of creditors in the bankruptcy case, held on June 27, 2006, Ross disclosed the above arrangement and payment method. The Trustee advised Ross and his counsel that the dividends were property of the bankruptcy estate and should no longer be paid to Ross but rather should be paid to the Trustee.
 - d. During the period from the petition date to October, 2006, Ross was paid dividends in the total amount of \$16,600.
4. The Complaints allege that by letter dated June 14, 2007, the Trustee again demanded that Ross pay the amount of the dividends to the Trustee. Ross's Answers deny receipt of the letter. However, he admitted that as of the Section 341(a) meeting he understood that the Trustee claimed the funds in question for the estate.
5. The Complaints allege that Ross failed and refused to pay the dividends to the Trustee or to cause the corporation to pay the dividends to the Trustee. Ross did not

¹ The factual allegations of the Complaints are identical. The Complaints differ only in regard to the statutory sections under which relief is sought. The Defendant's Answers to the Complaints differ only slightly from each other and not in any material way.

admit this allegation and instead stated in his Answer to Complaint to Deny

Discharge:

I disagree that I refused to pay the dividends to the trustee, that it was my intent after the 341 hearing to have my bankruptcy dismissed and that my attorney Kenneth Southerlin filed for said dismissal.

. . . I was under the assumption that my case was to be dismissed and the said monies were used to keep paying on my home and vehicle and other household bills, and have since lost the house and vehicle.

6. Ross testified that he visited Southerlin's office two days after the Section 341(a) meeting to sign documents necessary to request dismissal of his case. He testified that his attorney advised him to operate as normal until he heard something back about the dismissal.

7. The court's docket of the Chapter 7 case does not indicate any contact with or pleadings filed by Ross or his counsel from the time of the Section 341(a) meeting on June 24, 2006 to October 30, 2006, except as stated below. This court's internal CM/ECF docket includes the following note from a court case administrator. The public and attorneys of this court have no access to or knowledge of these notes, although they are part of the court's official record of the case:

Case Notes for Internal Use Only: re: Notice of Deficiency Financial Management Course (related document(s)22) ([case administrator])***contacted the law office of Kenneth Southerlin; he stated that he no longer represents the debtor; the last contact w/debtor - the debtor stated that he did not wish to proceed with the bankruptcy. Informed Mr. Southerlin that he needs to file the appropriate motion to resolve.*** (Entered: 08/25/2006)

8. On October 30, 2006, Southerlin filed a Motion to Withdraw as counsel stating that "The Debtor has informed the attorney that he no longer desires representation in this case. Debtor has signed a release terminating the attorney's services and Debtor's signature below again indicates his desire to terminate attorney's services." A

hearing was held on that matter on November 16, 2006, and the attorney was allowed to withdraw without objection. The record reflects that Ross was given notice of that hearing by First Class U.S. Mail on November 2, 2006 sent to the address that he had provided to the court as of that date. Ross was not present at the November 16 hearing.

9. The Chapter 7 Trustee as Plaintiff filed his Complaints on August 23, 2007, asking the court to compel turnover of the dividends pursuant to § 542(a) and to enter judgment in his favor in the amount of the dividends, and further asking the court to deny the debtor a discharge of his debts pursuant to § 727(a)(2)(B).
10. Ross's Answer to Complaint to Deny Discharge filed September 6, 2007, included the following statement:

... I did not intend to hinder, delay, or defraud the trustee nor I have [sic] intentionally concealed from the trustee or the court any property of the estate and ask the court to consider these facts in their findings of the case, and in fact that I have suffered severe financial hardship, that I am no longer an owner [of] the company I helped build, that I lost my vehicle and home through this action. My income in 2006 was even lower than when I filed in May of said year and this year is even lower due to the instability of the appraisal field, my loss of ownership which has severely handicapped me for generating more income as of now I am self employed and only get paid when I do appraisals.

11. At the trial, Ross testified that his income has dropped dramatically and that he lost his home and car. He testified that his income for 2006 was approximately \$40,000 and that he owed the IRS \$29,084 for that tax year. He brought his 2006 income tax returns to the trial. He testified that in June of 2006 he wanted his bankruptcy case dismissed because he could not meet his household or business expenses if he did not receive the money the Trustee was demanding.

DISCUSSION AND CONCLUSIONS OF LAW

In his Answers to the Trustee's Complaints Ross admits that he has been paid dividends from stock or an interest in a business that he owned as of the petition date in the amount of \$16,600. Therefore, these funds are property of the estate pursuant to 11 U.S.C. § 541(a)(6). These dividends were paid to Ross rather than to the Trustee on behalf of the estate and therefore, the Trustee must prevail on his claim for a judgment against Ross in the amount of \$16,600 and on his request for an order for turnover of those funds pursuant to § 542(a). Although Ross asserts that he did not wish to proceed with his case and rather asked his attorney to request dismissal, 11 U.S.C. § 707(a) provides that the court may dismiss a chapter 7 case "only after notice and a hearing and only for cause."² No request for dismissal was filed before these adversaries were initiated. Accordingly, this bankruptcy case continues, and this property of the estate must be returned for the benefit of creditors.

With regard to Ross's discharge, § 727(a)(2)(B) provides

(a) 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-- . . . (B) property of the estate, after the date of the filing of the petition.

² A debtor in a Chapter 7 case has no absolute right to a voluntary dismissal. *In re Klein*, 39 B.R. 530, 532 (Bankr. E.D.N.Y. 1984) ("[W]hile a debtor may voluntarily choose to place himself in bankruptcy, he does not enjoy the same discretion to withdraw his case once it has been commenced."); *Leach v. United States (In re Leach)*, 130 B.R. 855, 857 n.5 (B.A.P. 9th Cir. 1991). Rather, to obtain dismissal a Chapter 7 debtor "must make a showing of cause and demonstrate why dismissal is justified." *Terry v. Sparrow*, 328 B.R. 450, 455 (M.D.N.C. 2005); see also *In re Haney*, 241 B.R. 430, 432 (Bankr. E.D. Ark. 1999); *In re Terry*, No. 01-12750, 2003 WL 21219818, at *1 (Bankr. M.D.N.C. May 23, 2003). Courts consider the following factors when ruling on a debtor's motion to dismiss:

(1) whether all of the creditors have consented; (2) whether the debtor is acting in good faith; (3) whether dismissal would result in a prejudicial delay in payment; (4) whether dismissal would result in a reordering of priorities; (5) whether there is another proceeding through which the payment of claims can be handled; and (6) whether an objection to discharge, an objection to exemptions, or a preference claim is pending.

In re Turpen, 244 B.R. 431, 434 (B.A.P. 8th Cir. 2000).

11 U.S.C. § 727(a)(2)(B). The burden of proof on an objection to discharge is on the plaintiff, and it must prove its case by a preponderance of the evidence. Fed. R. Bankr. P. 4005; Siegel v. Weldon (In re Weldon), 184 B.R. 710, 713 (Bankr. D.S.C. 1995); Anderson v. Hooper (In re Hooper), 274 B.R. 210, 215 (Bankr. D.S.C. 2001) and cases cited therein. After the plaintiff establishes a prima facie case, the burden of proof shifts to the debtor to offer credible evidence explaining his conduct or “to provide any adequate justification to overcome the denial of discharge.” Weldon, 184 B.R. at 713. The ultimate burden of persuasion rests with the plaintiff. Hooper, 274 B.R. at 215 (citing Farouki v. Emirates Bank Int’l Ltd., 14 F.3d 244, 249 (4th Cir. 1994)).

In this case there is no question, based on Ross’s admissions in his pleadings, that he took possession of and retained or transferred property of the estate while fully aware of the Trustee’s claims to the property. The only issue remaining is whether he possessed the requisite intent to hinder, delay or defraud a creditor or an officer of the estate.

“Under the plain language of § 727(a)(2)(B), intent to hinder, intent to delay, and intent to defraud will each, independently, suffice under § 727(a)(2)(B) for discharge denial.” Searles v. Riley (In re Riley), 317 B.R. 368, 379 (B.A.P. 9th Cir. 2004). The debtor’s intent must be actual, not constructive. Nickless v. Saykosy (In re Saykosy), 382 B.R. 173, 176 (Bankr. D. Mass. 2008). However, “intent can be proven by direct evidence or by circumstantial evidence drawn from a debtor’s course of conduct.” Hooper, 274 B.R. at 217 (citing Kaler v. Craig (In re Craig), 195 B.R. 443, 450 (Bankr. D.N.D. 1996)). “Whether a debtor harbors ‘intent’ to hinder, or to delay, or to defraud the trustee or a creditor is a question of fact that requires the trier of fact to delve into the mind of the debtor and may be inferred from surrounding circumstances. Similarly, a course of conduct may be probative of

the question.” Riley, 317 B.R. at 379-80 (citing Emmett Valley Assocs. v. Woodfield (In re Woodfield), 978 F.2d 516, 518 (9th Cir. 1992) and Devers v. Bank of Sheridan (In re Devers), 759 F.2d 751, 753-54 (9th Cir. 1985)).³

In the present case Ross has not attempted to conceal his actions. Rather Ross testified that when he learned of the Trustee’s demands at the Section 341(a) meeting he wanted to dismiss his case and keep the money. No motion requesting dismissal was filed and his case was not dismissed. Ross has not returned the money and claims that he does not have sufficient funds to do so. However, the fact remains that he removed property of the estate from the hands of the Trustee and his creditors.

While “discharge of a debtor’s debts is favored,” § 727 “prohibits discharge for those debtors who ‘play fast and loose with their assets or with the reality of their affairs.’” Hooper, 274 B.R. at 214-15 (emphasis added) (quoting Farouki, 14 F.3d at 249). In the present case, there is no evidence that Ross was able to confirm that his bankruptcy case had in fact been dismissed before acquiring and spending the money in question. He merely assumed that once he advised his attorney he wanted his case dismissed that his attorney would act and that the court would dismiss the case. He spent the money with knowledge of the Trustee’s claim to the funds and with no confirmation from the court, the Trustee or his

³ Because of the practical difficulty of proving actual intent, courts have utilized seven indicators of fraudulent intent. These indicators are

1) insider relationships between the parties 2) the retention of, possession, benefit, or use of the property in question; 3) the lack or inadequacy of the consideration for the transfer; 4) the financial condition of the party sought to be charged both before and after the transaction at issue; 5) the existence or cumulative effect of the pattern or series of transactions or course of conduct after incurring the debt, onset of financial difficulties, or pendency or threat of suits by creditors; 6) the general chronology of the events and transactions under inquiry; and 7) an attempt by the debtor to keep the transfer a secret.

Saykosy, 382 B.R. at 176 (quoting Groman v. Watman (In re Watman), 301 F.3d 3, 8 (1st Cir. 2002)).

attorney that the court had in fact acted on his dismissal wishes. "Bankruptcy discharge is not a matter of right, but rather a statutory privilege afforded an honest debtor who meets certain requirements." Weldon, 184 B.R. at 712 (citing Hazelip v. Horridge (In re Horridge), 127 B.R. 798, 799 (S.D. Tex. 1991)). The evidence before the court is that Ross, having acted recklessly and carelessly regarding his obligations in this case and without due respect for the Trustee's demands, has by his actions demonstrated intent to hinder and delay his creditors and the Trustee.

For the reasons set forth above, it is

ORDERED, that pursuant to 11 U.S.C. § 542(a), Duane David Ross shall promptly turnover to the Trustee the sum of \$16,660, which is property of the estate. Turnover shall be within thirty (30) days of entry of this Order.

IT IS FURTHER ORDERED, that after said thirty (30) days, if Ross has not complied with this Order, the Trustee may obtain a judgment against Duane David Ross in the amount of \$16,600, including appropriate interest, by the filing of an affidavit with the court detailing the failure to pay and the requested amount, along with a proposed judgment.

IT IS FURTHER ORDERED, that pursuant to 11 U.S.C. § 727(a)(2)(B) Ross's discharge is denied.