UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
MYRA DELISE HILL,	)	CASE NO. 05-70083-MHM
	)	
Debtor.	)	
	)	
	)	
GUO PENG, LLC,	)	
	)	**ADVERSARY PROCEEDING**
Plaintiff,	)	**NO. 05-9147**
	)	
v.	)	
	)	
MYRA DELISE HILL,	)	
	)	
Defendant.	)	

O R D E R

Debtor/Defendant ("Hill") filed a petition initiating this Chapter 7 case June 3, 2005, after a disastrous day care business venture that began with a "closing" of its purchase May 14, 2004. Plaintiff was the landlord for the day care center, and Hill concedes owing it the amount established as the unpaid debt under the lease, $198,696.29. Plaintiff commenced this adversary proceeding October 13, 2005, seeking to deny the discharge by Hill of all her debts, not just the debt owed to Plaintiff. While Hill was represented by counsel at the outset of the Chapter 7, she proceeded in this adversary proceeding *pro se*.[1]

[1] Her attorney first sought to withdraw from representation October 31, 2005. After entry of two notices of deficiencies, one of which was for the certificate of service, the order allowing withdrawal was

Hill has two minor children and is a single mother. She is a schoolteacher, employed for the five years before this case began in elementary schools (K - 8th grade) in DeKalb County and Fulton County, Georgia. How Hill became aware of the opportunity to purchase the Tutor Time® day care center is unclear. Hill's desire to operate a day care center arose from her interest in the education of children, but she was aware she did not have the necessary business acumen to run a business. Thus, she engaged a friend, Michael Toyer ("Toyer"), to assist her.[2] Together they owned equal shares in the corporation formed to run the business, Hill-Toy, Inc, and, presumably, thought that the center might provide additional income. That was never the case; instead, it drained her of assets.

Hill purchased the center, the Tutor Time® Child Care Learning Center ("Tutor Time®") from Lewey Knox and his wife, Kymberly Knox. Lewey Knox was the former proprietor, doing business as Knox Kids II ("Knox"). Hill executed a purchase and sale agreement (the "Agreement"), which was a form filled in with handwriting by a business broker who was paid $5,000.00, primarily for finding a purchaser of the business from Knox. The Agreement established the price of Tutor Time® as $180,000 and provided for a down payment of $70,000 to be "verified" by April 30, 2004, but Hill at no time paid that

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entered April 3, 2006. By the time Hill's attorney sought to withdraw, Plaintiff had obtained permission to conduct a Rule 2004 examination of Hill, three creditors and two of the banks with which Hill maintained accounts.

[2] The evidence is incomplete about how much Toyer put into it, but Hill testified that he put "quite a bit" into the business to pay bills and staff.

much and could raise only approximately $50,000[3] in cash for the closing and no one put in the required additional amount of the down payment of $19,000. The express terms of that "contract" were not strictly followed as originally written, and no closing statement was discovered. The seller, Knox, apparently agreed to finance the remaining $135,000 due and owing on the $180,000 purchase price. At the closing, one of the more important agreements Hill signed was an assumption of the liability of Knox on the lease. From the perspective of all the evidence adduced, it appears that the inflated purchase price may have been intentionally designed to convince a naïve person such as Plaintiff that the center would generate substantial revenue; in any event, Plaintiff was apparently, and unreasonably, optimistic that the center would yield operating revenue sufficient to reflect the cost of the center.

Hill took over operation of Tutor Time® from Knox on or after June 1, 2004. Hill performed all the bookkeeping and supervisional chores to operate the center while the director ran the day-to-day operations. Hill wisely continued her employment as a full-time school teacher. The business began to unravel for Hill shortly after the purchase. The children enrolled for the summer were too few to carry the expenses of the center, and the State of Georgia withdrew a grant program providing food for the center's enrollees. In due course, instead of recompense for the responsibilities she'd undertaken, Hill found a part time job.

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[3] $26,000 of this amount was in loans from credit cards.

Both Hill and Toyer, her joint but passive investor, invested such additional funds as they had or could obtain to meet the regular costs of operation, which amounted to at least $45,000/month. Revenue from the business never exceeded $40,000 a month during the best months of operation. In addition to the payroll expenses for the center's employees, the obligations of the business included monthly payments on the note to Mr. Knox of $3,000, and monthly rent payments to the landlord (Plaintiff), of approximately $17,000. Hill and her joint investor also paid franchise and royalty fees of at least $1500.00 a month to the franchisor, Tutor Time® or to its affiliates.[4] In return for the fees to Tutor Time®, the center was authorized to use the copyrighted identity, Tutor Time®, presumably including an external sign, among other indicia, and was required to keep the center's books and records on a computer and computer software supplied by Tutor Time®. That computer and software were repossessed by Tutor Time® soon after Hill's first meeting of creditors. Hill-Toy, Inc. also purchased the Tutor Time® copyrighted materials – books and workbooks. The franchisor also required payments for advertising costs,[5] but they provided little benefit to the day care business. Hill testified that she expected to receive students from the advertising on the Tutor Time® website as part of the franchise deal. "[I]t was not a good deal," she discovered, because word of mouth produced most of the students who enrolled.

[4] Royalties were payable to Business Performance Associates, which aggregated $14,000 in Hill's bankruptcy schedules.

[5] *See,* Hill 's Schedule F : C & D Marketing Concepts owed $2164.67.

The center not only never received enough revenue to pay all of the center's operating expenses, Hill ended her operation of the center also owing over $7,000 in taxes to the IRS.

At some time prepetition, Hill had purchased a condominium in Seminole County, Florida. She explained that she purchased that property, not for herself, but, because she had good credit at the time of the purchase, for another, Toyer, who undertook to maintain all the financial obligations on the property. Hill received no benefit from the purchase except to have it in her name. Upon its sale postpetition, she realized no funds from the sale proceeds. While such a transaction is a bad deal from any business or personal perspective, Hill's combined lack of business acumen and naiveté did not enable her to see it for the unwise financial move that it was. Apparently, her attorney was unable to adequately understand the transaction to represent it accurately in Debtor's schedules. She revealed it to her attorney, and disclosed it in her schedules, and claimed a $500 exemption in her bankruptcy Schedule C. It is clear, however, that she had no intent to defraud anyone, least of all her creditors. The erroneous exemption listed in the schedules prepared by her attorney is an error attributable to her attorney, not to Hill. Consistent with her desire to put the disaster behind her, she signed a listing agreement to sell the condominium *after* she filed her Chapter 7 petition, but before the first meeting of creditors was held, and signed the papers to close its sale 5 days thereafter. While such a transaction is suspicious on its face and could perhaps provide a source of funds for an aggressive Chapter 7 Trustee, Hill's Trustee never pursued it. Hill never considered the condominium to be hers, testified

credibly that she received no benefit from owning it, and Plaintiff produced no contrary evidence.

While it was Defendant's admitted idea to buy the day care center, given her interest in education of children, she was fully aware she did not have the necessary business acumen and asked Michael Toyer to assist her. She received insufficient business-judgment assistance and the center received an unspecified amount of money in return for the one-half interest he obtained in Hill-Toy, Inc. Instead, she apparently provided him financial accommodation, by purchasing a condominium in Florida in her "name" only – i.e., she held title but he maintained the payments and took the equity upon sale. Occasional (at least two) mortgage payments and (at least one) homeowner's association payment were paid from the Hill-Toy operating bank checking account; Hill maintained that she did not authorize or make those disbursements or payments, but that Toyer had done so, in part in recompense for monies he had "put into" the center to pay ongoing expenses.

Hill was an opportune find for the business broker, to whom she paid $5,000 for the opportunity; for Tutor Time®, to whom she paid monthly fees to continue its franchise; for Michael Toyer, whose business acumen was not apparent, as he used his signature authority on the corporate bank accounts to pay several personal bills in recompense for having paid center operating expenses; and, especially for Mr. Knox, the center's seller, who unloaded his increasing and multiple financial liabilities onto Hill (including the landlord, Tutor Time® and tax liabilities). Hill unwittingly found herself in financial waters over her head

soon after the ink was dry on the purchase documents. She refinanced her home to obtain $11,000 for the center; she borrowed against her pension funds to put money into the purchase of the business, and she depleted her financial resources trying to keep the center afloat. Somehow she cobbled together enough money to make a $50-55,000 "down payment" on the center. Had she had a competent attorney or CPA at any point in time, she may have been guided away from the disastrous transaction. She did manage to pay most of the operating bills, and most importantly, as she saw the center sinking, she made sure that all the employees received their salaries and that the payroll taxes were paid. She closed the operation of the center on May 20, 2005, clearly exhausted and anxious to be rid of the burden. Under her ownership, the center operated for less than a year– and, for her financial health, 10-11 months too long.

DISCUSSION

Pursuant to 11 U.S.C. §727(a)(2), (3), (4) and (5), a debtor's discharge may be denied if:

> (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 –
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> > (A) property of the debtor, within one year before the date of the filing of the petition; or
> > (B) property of the estate, after the date of the filing of the petition;
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial

condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case –

(A) made a false oath or account;
(B) presented or used a false claim;
(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities[.]

The statutory provisions regarding discharge are to be construed liberally in favor of the debtor and strictly against an objecting creditor. *Heidkamp v. Whitehead,* 278 B.R. 589 (Bankr. M.D. Fla. 2002); *Baker v. Mereshian,* 200 B.R. 342 (9th Cir. BAP 1996); *First Beverly Bank v. Adeeb,* 787 F. 2d 1339 (9th Cir. 1986).

> Denial of a discharge in bankruptcy is a creditor's remedy of such sharply punitive permanence that it is reserved for the truly pernicious debtor. Only where there is a preconceived scheme to thwart the rights of creditors and the process of this court, or such a cavalier disregard of duty as to constitute the legal equivalent of those motives, is the discharge withheld.

In re Brame, 23 B.R. 196, 200 (Bankr. W.D. Ky. 1982).

The party objecting to a debtor's discharge has the burden of proof on all issues. *Chalik v. Moorefield,* 748 F. 2d 616 (11th Cir. 1984). *But see*, *Hawley v. Cement*

Industries, Inc., 51 F. 3d 246 (11th Cir. 1995)(Once creditor shows loss of assets, the burden of proof shifts to the debtor to satisfactorily explain the loss.) In objections to discharge based upon §727(a)(2) and (4), the party objecting to a debtor's discharge must show the debtor's conduct was motivated by actual fraudulent intent. *Future Time, Inc. v. Yates,* 26 B.R. 1006 (M.D. Ga. 1983). Such intent may be inferred from the facts and circumstances surrounding the debtor's conduct. *Id*. A false oath or account is "knowingly" false if the debtor knew the information omitted from the schedules should have been included but, for whatever reason, was not. *In re Shebel*, 54 B.R. 199 (Bankr. D. Vt. 1985). An inadvertent omission or an omission resulting from an honest but erroneous belief that the information need not be disclosed is not a knowing omission. *Id.*

Based upon Hill's demeanor and testimony at trial and based upon review of the transcripts of the Rule 2004 examination and the §341 meeting, Hill's various omissions and inadequacies are consistent with her lack of experience in the business world, and are integrally tied to her personality. Hill's lack of appropriate specificity in her bankruptcy schedules and her failure to retain financial records are tied to the fact that she allowed Tutor Time® to repossess the computer with the complete records of the center. Also, her failure to retain records appears to be a direct result of the enormous pain of reliving the disaster that the business venture became and confronting her flawed judgments about persons, opportunities and the center's prospects. Hill discarded records not only because she did not know they would pose a discharge problem for her, but it was also quite clear

that she discarded virtually everything that reminded her of both the disastrous year of the failed business venture and how those events pushed her into bankruptcy.

Hill's occasional inconsistent answers all reflect a disastrous combination of optimism, naiveté, total lack of business experience or judgment, inability to recognize earlier the enormity of the liability she undertook and her consequent financial mistakes in judgment, as well as an unending embarrassment that at times stifled her ability to launch the barest of defenses for herself. In short, denying her discharge would be as enormous a mistake by our legal system as the innocent mistakes she made in taking on the child care center's operations and liabilities. Our free enterprise system allows individuals, like Hill, to shoulder responsibilities that they are incapable of dealing with properly. The bankruptcy system was constructed to relieve such honest but unfortunate debtors of the injury of such debt. Hill was emotionally, educationally, experientially, financially and in all other relevant respects incapable of mounting any defense except meek, cooperative and blandly undefensive answers to questions. Nevertheless, the record reveals sufficient evidence to conclude that denial of Hill's discharge would heap unnecessary insult and lasting damage upon the financial injury already manifest.

Hill had no business acumen when the debacle of owning the center began and had little more by the time it closed. She did not foresee the inability of the center to pay its debts, did not foresee that she'd lose too many children and food grant funds in the summer, did not foresee that the help that Toyer would provide in various ways would be insufficient

in stark contrast to the business acumen she thought he would provide. She unwisely discarded all her books and records, keeping only the bills she had yet to pay until she paid them; she compliantly agreed, after the meeting of creditors, to let Tutor Time® repossess their computer, containing all the center's books and records.[6] At no point in the trial did it become evident that she had sufficient *scienter* to fulfill the requirements of "intent" required for any subsection of §727.

From her demeanor at trial, which is consistent with her answers at her 2004 examination, Hill is passive, demure, unfailingly polite, cooperative and compliant. She was once optimistic and is now embarrassed and broken financially. She was never a reasonable credit risk either for her Seller, for Tutor Time®, for her landlord [Plaintiff], the credit cards she relied on for "credit," or for suppliers of the day care center that remain unpaid. While relatively rare in occurrence, it is possible for an aggressive, well-represented and enterprising creditor to make out a technically correct case to avoid the discharge of a debtor when discharge denial would be a travesty of economic justice. In short, if Hill not been enthralled with the possibility of an enterprise benefitting children whose parents needed to rely on commercial child care, and if she had confined her endeavors to those with which she was fully competent, the debacle of the Tutor Time®

[6] In preference for using the computer for the business records, Hill had early on discarded any hard copies of the books and records she otherwise might have retained.

Child Care Center and her ensuing bankruptcy would not have occurred. Accordingly, it is hereby

ORDERED that judgment will be entered in favor of Defendant.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor/Defendant, Plaintiff's attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the ____ day of April, 2008.

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MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE