UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re:	)	
	)	**JUDGE RICHARD L. SPEER**
David/Dolores Strobel	)	
	)	Case No. 02-3049
Debtor(s)	)	
	)	(Related Case: 01-37435)
Louis Yoppolo, Trustee	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
David/Dolores Strobel	)	
	)	
Defendant(s)	)	

DECISION AND ORDER

This cause comes before the Court upon the Plaintiff/Trustee's Motion for Summary Judgment and Memorandum in Support; and the Defendants/Debtors' Response thereto. The Trustee's Motion is filed in support of his Complaint to Deny the Debtors' bankruptcy discharge pursuant to §§ 727(a)(2) and 727(a)(4)(A) of the Bankruptcy Code. As it pertains to these statutory exceptions to discharge, the following factual information was presented to the Court:

On December 4, 2001, the Debtors, David and Dolores Strobel (hereinafter referred to collectively as the "Debtors") filed a petition in this Court for relief under Chapter 7 of the United States Bankruptcy Code. In their statement of financial affairs, the Debtors listed, under question 10, the transfer of a 1981 mobile home for which they received Twenty-four Thousand Nine Hundred dollars ($24,900.00) in compensation. None of these proceeds, however, were listed in

their bankruptcy schedules, wherein the Debtors set forth, among other things, that they each had cash-on-hand of One Hundred dollars ($100.00) and a joint check account containing Five Hundred dollars ($500.00).

On January 23, 2002, the Debtors, as is required under § 341 of the Bankruptcy Code, attended the first meeting of creditors. At this time, the Plaintiff, Louis Yoppolo, who had been appointed as the trustee of the Debtors' bankruptcy estate, examined the Debtors under oath. At the onset of this examination, the Debtors testified that their bankruptcy schedules were complete and accurate and that no material changes were required to their schedules.

Later, during the examination, the Debtors were asked by the Trustee whether they had owned any real property in the previous four years. In response, the Debtors disclosed that they had recently disposed of some real estate – specifically, the mobile home listed in their schedule of financial affairs. As it relates to this particular transaction, the Debtors went on to disclose that, in September of 2001, they sold this real estate, which was free and clear of liens, for Twenty-two Thousand Nine Hundred dollars ($22,900.00), and that after paying some debts, they still retained Sixteen Thousand dollars ($16,000.00). Upon further inquiry, the Debtor, Dolores Strobel, admitted to the Trustee that she was currently in possession of a cashier's check, with herself as the named payee, in the amount of Sixteen Thousand dollars ($16,000.00); upon learning of this fact, the Trustee immediately sought and received from Mrs. Strobel turnover of this check.

Based upon the above events, the Trustee filed the instant complaint seeking to deny the Debtors' bankruptcy discharge on two separate grounds: (1) the Debtors knowingly and fraudulently made a false oath or account as is proscribed by § 727(a)(4)(A); and (2) with the intent to hinder, delay or defraud the trustee, the Debtors had concealed their property and/or property of their bankruptcy estate as is prohibited by § 727(a)(2). To support his claims, the Trustee then conducted

a deposition of each of the Debtors. The information received therefrom may be summarized as follows:

> First, it was again reiterated that the Debtors sold their mobile home in September of 2001, and that after making certain remunerations, the Debtors retained at their disposal the sum of $16,000.00. (Debtors' Depo. Tr., at pgs. 10-15).
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> Second, the Debtors acknowledged that at the time they executed their bankruptcy petition they "had either cash or checks in the range of $16,000.00," and that these funds were not listed in their bankruptcy petition. (Debtors' Depo. Tr. at pgs. 8-9, 18-19, 27). Similarly, Mrs. Strobel acknowledged that on the date that she and her husband filed their bankruptcy petition, she had either bank deposits or a cashier's check for $16,000.00. (Debtors' Depo. Tr., at pgs. 25-26).
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> Third, the Debtors acknowledged that they had reviewed their bankruptcy petition, and that they were aware that all of their property had to be disclosed in the petition. (Debtors' Depo. Tr., at pgs. 33-36). In this respect, when asked why the $16,000.00 dollar cashier's check was not disclosed in her bankruptcy schedules, Mrs. Strobel testified simply, "I don't know." (Debtors' Depo. Tr., at pg. 32). In like fashion, Mr. Strobel indicated that he thought the failure to list the $16,000.00 check was "a mistake or oversight." (Debtors' Depo. Tr., at pg. 36).

LEGAL DISCUSSION

At issue in this case is whether the Debtors are entitled to receive their bankruptcy discharge pursuant to 11 U.S.C. § 727(a). As determinations concerning objections to discharge are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(J), this Court has the jurisdictional authority to enter final orders in this matter.

For an individual debtor, the bankruptcy discharge constitutes the core of the bankruptcy process. As a result, it is well established that the exceptions to discharge set forth in § 727 are to be strictly construed in favor of the debtor. *In re Juzwiak*, 89 F.3d 424, 427 (7th Cir.1996). To this end, it is also well established that the party moving for the denial of the debtor's discharge bears the burden to establish, by at least a preponderance of the evidence, that one of the exceptions to discharge set forth in § 727 is applicable. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000). In this regard, the Trustee in this case has set forth two statutory grounds to have the Debtors' discharge denied: § 727(a)(2) and § 727(a)(4)(A). However, before beginning with the actual merits of the Trustee's case, a word concerning the procedural posture of this case needs to be mentioned.

In the instant case, the Trustee seeks to deny the Debtors' discharge by and through a motion for summary judgment. Under Fed.R.Civ.P. 56, which is made applicable to this proceeding by Bankruptcy Rule 7056, a movant will only prevail on a motion for summary judgment if, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In making this determination, inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 586-88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Moreover, in cases brought under § 727(a)(2) and § 727(a)(4)(A), which involve a debtor's intent, summary judgment is generally not appropriate. This is because questions involving a debtor's intent are factual issues which require, among other things, that the trier of fact, after observing the debtor's demeanor, make a credibility assessment concerning the debtor's explanatory testimony. *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 159 (Bankr. N.D.Ohio 1998); *In re Kontrick*, 295 F.3d 724, 737 (7th Cir.2002). Nevertheless, if there is no possibility that a debtor will be able to rebut the moving party's claim, then summary judgment is still appropriate. *Id*. In this respect, a debtor may not rely on improbable inferences and unsupported speculation. *In re Sowers*, 229 B.R. at 159.

Denial of Discharge under § 727(a)(2)

The first statutory basis upon which the Trustee relies to deny the Debtors a bankruptcy discharge is § 727(a)(2) which 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–
>
> > (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[.]

The purpose of this section is "to prevent the discharge of a debtor who attempts to avert collection of his debts by concealing or otherwise disposing of assets." *Cobb v. Hadley (In re Hadley)*, 70 B.R. 51, 53 (Bankr. D.Kan.1987). In this case, the Trustee argues that both subparagraphs (A) and (B) of § 727(a)(2) are applicable based upon the fact that the Debtors concealed from their bankruptcy estate, the Sixteen Thousand dollars ($16,000.00) in proceeds that they had retained from the prepetition sale of their mobile home. As it pertains to this assertion, these two particular facts are not in dispute: (1) as applied to subparagraph (A) of § 727(a)(2), the Debtors, within one year of filing for bankruptcy, had Sixteen Thousand dollars ($16,000.00) in liquid assets available to pay their creditors; and (2) upon filing for bankruptcy, these assets, for purposes of subparagraph (B) of § 727(a)(2), became property of the Debtors' bankruptcy estate. Thus, based upon these facts, it is clear that, in line with the Trustee's assertion, both subparagraphs (A) and (B) of § 727(a)(2) are potentially applicable. Accordingly, the ensuing discussion will focus exclusively on whether those requirements common to both subparagraphs (A) and (B) are applicable.

For an action brought under either subparagraph (A) or (B) of § 727(a)(2), two elements must be established: (1) a concealment or other disposition of property; and (2) a subjective intent on the debtor's part to hinder, delay or defraud a creditor or officer of the estate (e.g., the Trustee). *See In re Keeney*, 227 F.3d at 683. For purposes of these two requirements, a debtor will be found to have concealed their property when he or she withholds knowledge of an asset by preventing the discovery of or the failure or refusal to divulge owed information. *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151 (Bankr. N.D.Ohio 1998); *Excelsior Truck Leasing Co. Inc. v. Bernat (In re Bernat)*, 57 B.R. 1009 (E.D.Pa.1986). A debtor's wrongful intent, on the other hand, may only be established by the moving party demonstrating that the debtor acted with the actual intent to defraud; constructive fraud (that is, fraud imposed by law) is insufficient. *In re Sowers*, 229 B.R. at 157. Although actual intent is difficult to prove directly, it may be established by circumstantial evidence and/or inferred from a debtor's course of conduct. In this regard, a reckless disregard for the truth will be considered an intentional act. However, any evidence which shows that a debtor was just simply ignorant of his or her actions will tend to negate the existence of any fraudulent intent. *Id*.

As it pertains to the above standards, the facts presented in this case show that in the few months before filing for bankruptcy relief, the Debtors disposed of a mobile home, obtaining from the sale approximately Twenty-three Thousand dollars ($23,000.00). The Debtors then, after paying some expenses, retained for themselves Sixteen Thousand dollars ($16,000.00) which, on January 22, 2002, was converted into the form of a cashier's check made payable to the Debtor, Dolores Strobel. No notice as to the existence of these funds, however, was provided in the Debtors' bankruptcy petition which was filed the day after the cashier's check was obtained. Similarly, the existence of these funds, although eventually revealed only after a specific inquiry by the Trustee, was not voluntarily disclosed by the Debtors at their first meeting of creditors.

In considering the above course of events, it is readily apparent that a number of strong indicia of fraudulent concealment exist in this case. To begin with, and a common paradigm in many

fraudulent concealment situations, the Debtors in this case failed to disclose the existence of a significant asset in both their bankruptcy schedules and initially at the first meeting of creditors. *See Kunce v. Kessler (In re Kessler),* 51 B.R. 895, 898 (Bankr. D.Kan.1985) (the failure to list property is strong evidence of concealment); *Armstrong v. Lunday (In re Lunday),*100 B.R. 502, 506 (Bankr.D.N.D.1989) (false testimony given at first meeting of creditors may provide basis for denying discharge under § 727(a)(2)). Second, and very telling of the Debtors' state of mind, neither of the Debtors offered any justifiable basis for their conduct. In fact, to the contrary, when asked about their significant omission, the Debtors acknowledged that they knew that all of their property had to be disclosed.

Finally, a couple of things, when viewed together, make the overall timing of events in this case highly suspect. First, the Debtors sold, for cash, a major asset in the months immediately preceding the filing of their bankruptcy petition. Second, and even more disturbing, on the eve of filing for bankruptcy the Debtors exchanged an asset easily seized by a creditor or a trustee – e.g., a bank account – for an asset very hard to seize – e.g., a cashier's check. As it relates to this conduct, neither of the Debtors offered a satisfactory explanation as to why they needed to obtain a cashier check, representing most of their liquid assets, on the eve of bankruptcy.

The Debtors, however, seek to rebut any inference of fraudulent concealment by raising a number of different points. First, and foremost, the Debtors argue that although they did not disclose the existence of the cashier's check, they did disclose, in their bankruptcy petition, the sale of their mobile home. Thus, according to the Debtors, the Trustee was clearly put on "notice of an area of reasonable inquiry." (Defendant's Memorandum in Opposition to Motion for Summary Judgment, at pg. 2). In addition, the Debtors assert that had they really intended to conceal the cashier's check they could have either (1) spent the money before filing for bankruptcy or (2) they could have failed to bring the cashier's check to the meeting of creditors. As will now be explained, however, all of these arguments must fail.

First, it does not automatically follow that a debtor who wishes to fraudulently conceal some specific type of property will completely dispose of that property prior to filing for bankruptcy. In fact, the exception to discharge contained in subparagraph (B) of § 727(a)(2) (involving disposing of property of the estate) is premised on the notion that a dishonest debtor may attempt to conceal, on a postpetition basis, nonexempt prepetition property. Second, the Court simply cannot accept the argument, under the circumstances presented here, that because the Debtors brought their cashier's check to the first meeting of creditors, but did not voluntarily disclose its existence, that they lacked any intent to conceal this asset. This is not to say, however, that the subsequent disclosure of an asset by a debtor may not, in some circumstances, mitigate against a finding of fraudulent concealment. For example, a lack of fraudulent intent has been found where a debtor, at the first meeting of creditors, *discloses on their own initiative* an omission in their bankruptcy petition. *Gillickson v. Brown (In re Brown)*, 108 F.3d 1290 (10th Cir. 1997). In this case, however, it is clear that the Debtors' conduct does not even come close to conforming to this model as the Debtors only disclosed the existence of their cashier's check upon prodding by the Trustee. *See Williamson Construction, Inc. v. Ross (In re Ross)*, 217 B.R. 319, 324 (Bankr. M.D.Fla.1998) (where debtor readily discloses existence of property at meeting of creditors, fraudulent intent may be negated). In this regard, the Court does not believe that the Debtors were so ignorant of the bankruptcy process that they would not know, after initially being asked by the Trustee if any material changes were needed to their bankruptcy schedules, to immediately disclose the existence of a significant sum of money. This is even more troubling considering that the Debtor, Mrs. Strobel, had the cashier's check on her physical possession at the time she was asked if any changes to her petition needed to be made.

Similarly, the mere fact that the Debtors disclosed the sale of their mobile home, and thereby put the Trustee on potential notice as to the proceeds received from this transaction, does not change this result. This is because the bankruptcy process is based upon *full and complete* disclosure. As was very well stated in *Fokkena v. Tripp (In re Tripp)*:

> The Code requires nothing less than a full and complete disclosure of any and all apparent interests of any kind. A debtor has an uncompromising duty to disclose whatever ownership interests are held in property. It is not for the debtor to pick and choose or to obfuscate the answers.

224 B.R. 95, 98 (Bankr. N.D.Iowa 1998) (internal citations and quotations omitted).

Thus, to encapsulate the above discussion, it is clear that very strong evidence exists that the Debtors attempted to fraudulently conceal a major asset from the Trustee. Once more, the Debtors have not been able to offer any credible explanation for this conduct. Thus, in giving this matter very thorough consideration, it is the finding of this Court that Summary Judgment is appropriate on the Trustee' cause of action against the Debtors under 11 U.S.C. § 727(a)(2). In this regard, the Court considers the circumstances presented here to be a prime example of what can be termed the "don't ask, don't tell" game. That is, if the trustee doesn't ask, the debtor will not tell. Such a game, however, given the full disclosure requirements of the Bankruptcy Code, simply can not and will not be tolerated.

Denial of Discharge under § 727(a)(4)(A)

In addition to the Trustee's cause of action under § 727(a)(2), the Trustee also seeks to deny the Debtors' discharge under paragraph (a)(4)(A) of § 727. Although this Court has already found that the Debtors are not entitled to a bankruptcy discharge under paragraph (a)(2) of § 727, the Court, given the serious nature of the Trustee's Complaint, will also address the merits of this statutory exception to discharge.

Section 727(a)(4)(A) of the Bankruptcy Code provides:

(a) The court shall grant the debtor a discharge, unless–

> (4) the debtor knowingly and fraudulently, in or in connection with the case–
>
> (A) made a false oath or account;

The fundamental purpose of § 727(a)(4)(A) is to insure that the trustee and creditors have accurate information about the debtor's financial affairs without having to conduct costly investigations. *Fogal Legware of Switzerland, Inc. v. Wills (In re Wills)*, 243 B.R. 58, 62 (9th Cir. B.A.P. 1999). For a party to establish their burden under this section, five elements must be shown to exist: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. *In re Keeney*, 227 F.3d at 685.

As it pertains to these elements, a couple facts of law are well established. First, omissions, as well as affirmative statements, may qualify as a false oath or account as those terms are used in § 727(a)(4)(A). *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir.1992); *Casey v. Kasal*, 223 B.R. 879, 884 (E.D.Pa.1998). Second, statements or omissions made either on a debtor's bankruptcy schedules or at a meeting of creditors qualify as occurring under oath for purposes of § 727(a)(4)(A). *Dana Federal Credit Union v. Holt (In re Holt)*, 190 B.R. 935, 939 (Bankr. N.D.Ala.1996). Thus, from these legal precedents, it is clear that, on account of the Debtors' failure to disclose a major asset, the first two elements set forth above have been met.

Furthermore, elements three and five, as set forth above, have also undoubtably been satisfied given that there is no disagreement between the Parties that the Debtors, although testifying that they knew that all of their property had to be disclosed, nevertheless failed to disclose a major asset. As it pertains thereto, it is observed that the Bankruptcy Appellate Panel for the Sixth Circuit has stated "a fact is material if it concerns discovery of assets, business dealings or the existence or disposition of property. Knowledge [on the other hand,] may be shown by demonstrating that the debtor knew

the truth, but nonetheless failed to give the information or gave contradictory information." *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir.1999) (internal citations and quotations omitted).

Finally, given the Court's previous analysis under § 523(a)(2), it is also this Court's finding that the Debtors, by failing to mention a Sixteen Thousand dollar ($16,000.000) liquid asset, were acting with the intent to defraud the Trustee. Accordingly, given that all of the elements of § 727(a)(4)A) have been met, the Debtors' bankruptcy discharge must also be denied pursuant to 11 U.S.C. § 727(a)(4)(A). In this regard, it is noted that in many instances where the facts support the denial of a debtor's bankruptcy discharge under § 727(a)(2), a denial of a debtor's discharge will also be appropriate under § 727(a)(4)(A).

In summary, this Court finds that the Trustee has been able to show, by a preponderance of the evidence, that the Debtors, with the intent to defraud, gave false statements at the first meeting of creditors and also intentionally omitted information from their bankruptcy schedules. Accordingly, the Debtors' bankruptcy discharge will be denied pursuant to both §§ 727(a)(2) and 727(a)(4)(A). In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Decision.

Accordingly, it is

ORDERED that the Motion for Summary Judgment filed by the Plaintiff/Trustee, Louis Yoppolo, be, and is hereby, GRANTED.

It is ***FURTHER ORDERED*** that the Defendants/Debtors, David and Dolores Strobel, are hereby Denied a bankruptcy discharge pursuant to 11 U.S.C. §§ 727(a)(2) and 727(a)(4)(A).

It is ***FURTHER ORDERED*** that the Clerk, U.S. Bankruptcy Court, serve a notice of this Order upon the Debtor, Attorney for Debtor, the Trustee, and all of the Creditors and Parties in Interest.

Dated:

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Richard L. Speer
United States
Bankruptcy Judge