IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re RONNIE HOBERT GENTRY, Debtor.	No. 97-20717 Chapter 7
BARBARA CASTEEL, Plaintiff, *vs*. RONNIE HOBERT GENTRY, Defendant.	Adv. Pro. No. 97-2052

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding came before the court for trial on February 25, 1998, upon the plaintiff's amended complaint objecting to discharge under 11 U.S.C. § 727(a)(4) and (5) and requesting a determination of nondischargeability of debt under 11 U.S.C. § 523(a)(2)(A). Consolidated with the trial was a hearing on plaintiff's motion to dismiss for lack of good faith pursuant to 11 U.S.C. § 707(a) filed in the underlying chapter 7 case. For the following reasons, the motion to dismiss will be denied and the adversary proceeding dismissed, the court having concluded that the judgment debt owed by debtor Ronnie Hobert Gentry to plaintiff Barbara Casteel should not be excepted from discharge and that the debtor should be granted a discharge. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(A),(I),(J) and (O).

I.

The facts of this case arise out of a friendship that went awry when one friend loaned money to the other and brings to mind the Shakespearean quotation:

> Neither a borrower nor a lender be:
> For loan oft loses both itself and friend,
> And borrowing dulls the edge of husbandry.

W. SHAKESPEARE, *Hamlet*, Act I, Sc. 3, pp. 75-76, THE COMPLETE PLAYS AND

POEMS OF WILLIAM SHAKESPEARE (W.A. Neilson 1941).

The debtor and plaintiff are both employed by Holston Defense Corporation, a subsidiary of Eastman Chemical Company ("Eastman"), in Kingsport, Tennessee, the debtor having worked there 30 years and the plaintiff 32 years. For five years, both worked in the accounting department, their desks being approximately ten feet apart. As coworkers they became, in the words of both, best friends, often lunching together or spending break time together when they would go outside to smoke cigarettes since smoking was prohibited within the office.

In May 1995, plaintiff offered to loan the debtor $2,000.00 when she learned that he was experiencing financial problems due to the expense of caring for his terminally ill mother. The debtor accepted the offer, receiving a check from the plaintiff on May 18, 1995. To repay the loan plus a small amount of interest, the debtor gave plaintiff twelve postdated checks in the amount of $175.83 each, with the first check dated July 1, 1995, and subsequent checks dated the first of each month thereafter. Only the July and August payments were ever made on the loan.[1]

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[1]Plaintiff testified that the debtor told her not to deposit the July check and instead paid her in cash although the payment was three weeks late. She stated that when he made a payment, she would write him a receipt on the back of the appropriate (continued...)

In early December 1995, the debtor asked plaintiff to loan him the sum of $4,000.00 because he was behind on his mortgage payments. Plaintiff agreed. To evidence the indebtedness, the debtor gave plaintiff a check on December 8, 1995, for $4,400.00, the amount of the loan plus 10% interest, dated for March 1996 when the employees of Eastman and its subsidiaries were scheduled to receive their annual wage dividend checks.

The check was never deposited and no payments were ever made on the $4,000.00 loan. On January 7, 1997, plaintiff sued to recover the sums she was owed from both loans. A consent judgment in the amount of $6,266.34 was entered on February 19, 1997, in the General Sessions Court for Sullivan County, Tennessee. Plaintiff subsequently began collection efforts by

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[1](...continued)
postdated check. Plaintiff also testified that when it was time for the August payment to be made, the debtor again told her not to deposit the check. She stated that the debtor paid her $100.00 in cash two weeks after the August payment was due and that the balance of the August payment was not made until September. The debtor, however, submitted the July and August checks which contradicted the plaintiff's testimony. The receipt written by the plaintiff on the back of the July check reads: "Paid $175.83 7-5-95 B Kiser." (Plaintiff's last name was Kiser prior to her marriage in 1996.) On the back of the August check, plaintiff wrote: "Received $175.83 Cash from R.Gentry. Barbara Kiser 8-1-95." Plaintiff denied that payment had been made on the dates written on the back of the checks, explaining that she did not put the correct date of payment on the receipts so that if anything happened, no one would know that the debtor had been late in paying her. The court did not find the plaintiff credible in this regard.

filing a garnishment application on March 4, 1997, and proceeded to garnish two regular biweekly paychecks of the debtor in the amount of $300.00 each.

These collection efforts were stayed when the debtor filed a voluntary petition on March 21, 1997, commencing this chapter 7 bankruptcy case. The debtor's schedules list assets of $60,524.19[2] and liabilities of $100,310.69, consisting of secured debts of $79,372.11 and unsecured, nonpriority debts of $20,938.58. Plaintiff was included in the list of unsecured creditors with a scheduled debt of $6,266.34.

On July 15, 1997, plaintiff filed a motion to dismiss the debtor's bankruptcy case pursuant to 11 U.S.C. § 707(a) on the basis that it was filed in bad faith. As grounds for the dismissal, plaintiff alleges that:

(1) the debtor had significant income in 1995 and 1996 yet failed or refused to pay his obligations during that period of time, including his obligation to the plaintiff;

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[2]The debtor listed his interest in these assets as only $728.57. Apparently, debtor was under the mistaken assumption that value is limited to equity and that any equity is split in half if the asset is jointly owned with a spouse, even though the nature of the interest is a tenancy by the entirety. ***See, e.g., Hackett v. Commercial Banking Corp. (In re Hackett)***, 13 B.R. 755, 756-57 (Bankr. E.D. Pa. 1981)(individual who holds property as tenant by the entireties may not treat the tenancy as divided in half for purposes of administration of bankruptcy estate).

(2) the debtor has failed to provide an adequate explanation as to the use of his money during those years;

(3) the debtor has not made a good faith attempt to resolve his debt problems but has instead evaded and avoided his obligations; and

(4) the chapter 7 case was filed primarily to avoid paying the plaintiff and a debt owed for the funeral of debtor's mother since the debtor did not have significant debts at the time of his bankruptcy filing and has reaffirmed all secured debts and even one large unsecured debt.

Contemporaneous with the filing of the motion to dismiss, plaintiff initiated this adversary proceeding by filing a complaint to determine the dischargeability of debt and objecting to discharge. Plaintiff alleges in the complaint that the debt owed to her by the debtor arising out of the $4,000.00 loan is nondischargeable under § 523(a)(2)(A) of the Bankruptcy Code because it was procured by false pretenses, a false representation, or actual fraud in that the debtor never had any intention to repay the money he borrowed from her. Plaintiff asserts that the debtor made false representations as to the use, the necessity, and the repayment of the loan, including the misrepresentation that he would repay the loan upon receiving his annual wage dividend check.

Plaintiff also alleged in her original complaint that the debtor should be denied a discharge under 11 U.S.C. § 727(a)[3] because he knowingly and fraudulently made false oaths and accounts in connection with his bankruptcy case. Subsequently on February 17, 1998, plaintiff amended her complaint[4] to assert that the debtor should be denied a discharge under 11 U.S.C. § 727(a)(5) because he allegedly failed to explain satisfactorily the loss or deficiency of his assets to meet his prepetition liabilities. Plaintiff notes that debtor and his wife had gross annual income of almost $65,000.00 in 1996, yet the debtor failed to pay plaintiff, his monthly mortgage payments of $550.00 per month and the funeral bill of his mother, and failed to insure his house or his vehicles. Plaintiff also asserts that throughout 1996, the debtor made

[3]Plaintiff did not reference any particular subsection of § 727(a), but the allegations clearly model § 727(a)(4)(A).

[4]Pursuant to the court's directive at a hearing on plaintiff's motion to amend complaint on February 11, 1998, and as incorporated in the court's order of February 19, 1998, plaintiff was permitted to amend her complaint to include § 727(a)(5) as an additional ground for the denial of discharge since the factual allegations which would support discharge denial on this basis had been pled in the original complaint. In his answer to the amended complaint filed on February 20, 1998, debtor asserted that the amended complaint added new facts not previously before the court and should therefore be dismissed. The court having concluded that the amended complaint should be dismissed, the debtor's objection to the amended complaint is moot.

substantial cash withdrawals from his checking account on a regular basis but has failed to offer any explanation for his use of the withdrawn funds. On February 24, 1998, an order consolidating the hearing on the motion to dismiss with the trial of this adversary proceeding was entered by the court at the plaintiff's request without objection from the debtor.[5]

II.

11 U.S.C. § 523(a)(2)(A) provides in relevant part that:

> (a) A discharge under section 727 ... does not discharge an individual debtor from any debt— ...
> (2) for money ... to the extent obtained by—
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition ....

As recently reiterated by the Sixth Circuit Court of Appeals:

> In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained the money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably [footnote omitted] relied upon the false representation; and (4) its reliance was the proximate cause of the loss. *See Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993). In order to except a debt from discharge, a creditor must prove each of these elements by a

[5]The court granted the plaintiff's motion to consolidate at a hearing on August 26, 1997, but counsel inadvertently failed to timely tender an order as directed by the court.

> preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 291 (1991). Further, exceptions to discharge are to be strictly construed against the creditor. *See Manufacturer's Hanover Trust v. Ward, (In re Ward)*, 857 F.2d 1082, 1083 (6th Cir. 1988).

Rembert v. AT&T Universal Card Services, Inc. (In re Rembert), ___ F.2d ___, 1998 WL 161706 at *2 (6th Cir. 1998).

Plaintiff does not challenge the dischargeability of the first loan in the amount of $2,00.00 that she made to the debtor in May 1995. She acknowledges that the debtor did not request this loan and thus made no representations falsely or otherwise to obtain the money. The plaintiff charges, however, that the $4,000.00 loan made in December 1995 was obtained through false representations that the money was needed to catch up the debtor’s home mortgage payments and that the debtor would repay the plaintiff out of his annual wage dividend check.

With respect to the first alleged misrepresentation, the evidence undisputedly established that rather than false, the statement was in fact correct: the debtor was behind in his mortgage payments and the December loan was needed and used to catch up these payments. Mr. Gentry testified that by December 1995, he was some six or seven months behind in his mortgage and no evidence was offered to the contrary. On December 15, 1995, the debtor mailed a cashier’s check in the amount of $2,274.00 to F.T.B. Mortgage Services and on December 29, 1995, he wired

$3,090.00 through Western Union to F.T.B. Mortgage Services. Mr. Gentry testified that the money had been wired because it was necessary for the funds to be received by the mortgage holder by a certain date in order to stop the scheduled foreclosure.

The plaintiff made much-to-do about the fact that the debtor did not immediately forward all of the loan proceeds to the mortgage holder upon receiving the check from the plaintiff on December 8, 1995, but instead placed the money in his checking account with the result that some of the monies were used to pay various living expenses. Even though the mortgage holder was not paid until one week and three weeks after the loan from the plaintiff, the fact remains that the debtor would not have been able to catch up his mortgage payments but for the loan from the plaintiff. Accordingly the court finds no misrepresentation as to the need or purpose of the loan and its usage.

Plaintiff also contends that the debtor made a material misrepresentation with the intent to deceive by telling her that he would repay her from his annual wage dividend check when he had no intention of doing so. Obviously, it was contemplated that the loan would be repaid at wage dividend time since the $4,400.00 check was dated for March 1996, when wage dividends are generally paid. The parties' testimonies as to why the loan was not paid at that time differed. The debtor testified that the plaintiff telephoned him on the day wage dividends were announced[6] and advised him that she was going out of town on a trip. He asked if she had cashed the $4,400.00 check and she allegedly told him that she was not calling about the check. The debtor testified that he asked plaintiff if it would be okay if he used his wage dividend to pay more pressing bills and she told him not to worry about repaying her now.

Plaintiff testified that she telephoned the debtor about a week after the wage dividends were declared because she had not heard from him about repaying the loan. She stated that when the debtor heard her voice, he told her that he had been meaning to call her about the check. He allegedly told her not to cash the check because he had not been to the bank and he would telephone her after he deposited his wage dividend check. She denied that the debtor said anything about paying other debts before paying her and denied that she told the debtor she was going on a trip or that she went on a trip at that time. Plaintiff admitted that nothing prevented her from presenting the check to the bank for payment, but testified that she never

[6]Both plaintiff and debtor testified that because Eastman together with its subsidiaries is the largest employer in Kingsport, Tennessee, the annual wage dividend declaration is always front page news.

did so out of her feelings for the debtor.

Regardless of which version of the telephone call is accurate, there was no change in plaintiff's behavior toward the debtor despite his failure to repay plaintiff from his wage dividend. Plaintiff testified that she and the debtor remained good friends until she sued him in January 1997 to collect on the loan. Debtor gave the plaintiff a wedding present when she married in June of 1996 and plaintiff attended the wedding of the debtor's son in December 1996. Furthermore, plaintiff admitted in her deposition that the first time she made any demand on the debtor for repayment of the loan was in October 1996, when she telephoned the debtor and asked if he could repay her $1,000.00 at that time since she was planning a trip.

The mere fact that the debtor failed to repay the plaintiff with his dividend check does not *ipso facto* establish the necessary elements of § 523(a)(2)(A). *See* 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][d] (15th ed. rev. 1998). It must be proven that at the time of the representation, the debtor had no intention to repay plaintiff from his wage dividend and that he made the representation with the intent to deceive.

> Whether a debtor possessed an intent to defraud a creditor within the scope of § 523(a)(2)(A) is measured by a subjective standard ....
>
> ....

> ...[T]he proper inquiry to determine a debtor's fraudulent intent is whether the debtor subjectively intended to repay the debt.
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> ... Thus, a debtor's intention—or lack thereof—must be ascertained by the totality of the circumstances. [Citation omitted.]
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> ... "What courts need to do is determine whether all the evidence leads to the conclusion that it is more probable than not that the debtor had the requisite fraudulent intent ...." [Citation omitted.]

In re Rembert, ___ F.2d ___, 1998 WL 161706 at *2-4.

Based on a consideration of the totality of the circumstances, the court is firmly convinced that the debtor was sincere when he told the plaintiff he would repay her from his wage dividend. In fact, the only evidence that the plaintiff could point to when asked why she thought the debtor had defrauded her was that he had failed to repay her and that she did not know about all of the debt the debtor was carrying. As will be discussed more fully below, the debtor did not anticipate that his financial problems would continue to escalate and prevent him from paying plaintiff as he promised. A good faith promise to pay which a borrower is unable to keep due to a financial collapse does not provide a basis for fraud. *See, e.g., Mason Lumber Co. v. Martin (In re Martin)*, 70 B.R. 146 (Bankr. M.D. Ala. 1987). Accordingly, plaintiff's cause of action seeking to deny dischargeability of the debt owed to her by the debtor will be dismissed.

III.

11 U.S.C. § 727(a)(5) provides that "[t]he court shall grant the debtor a discharge, unless ... 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." Rule 4005 of the Federal Rules of Bankruptcy Procedure places the burden squarely upon the creditor objecting to discharge to prove the debtor is not entitled to a discharge. Like issues of dischargeability, exceptions to discharge under § 727 require proof by a preponderance of the evidence. *See Barclays/American Business Credit, Inc. v. Adams (In re Adams),* 31 F.3d 389, 394 (6th Cir. 1994), *cert. denied, Adams v. Barclays American Business Credit, Inc.*, 513 U.S. 1111, 115 S. Ct. 903 (1995).

Once a party objecting to discharge has met the initial burden of proving the disappearance or shortage of assets, the burden shifts to the debtor to explain satisfactorily the loss of the particular assets. *Forbes v. Dixon (In re Dixon)*, 884 F.2d 578, 1989 WL 100068 (6th Cir. 1989)(unpublished). "A debtor's explanation for the loss or deficiency need not be meritorious but must convince the judge that the debtor has not hidden or improperly shielded assets." *Krohn v. Cromer (In re Cromer)*, 214 B.R. 86, 95 (Bankr. E.D.N.Y. 1997). *See also Lini, Inc. v. Schachter (In re Schachter)*, 214 B.R. 767, 774 (Bankr. E.D. Pa. 1997)(§ 727(a)(5) is an easy ground for an honest debtor to overcome since it is confined to those instances where the debtor offers no credible explanation for the loss or deficiency of assets).

Plaintiff asserts that the debtor has failed to explain satisfactorily where his money went and why he was unable to pay his obligations. She notes that debtor's 1995 and 1996 incomes respectively were $39,703.92 and $46,279.77 and that his wife's income in 1996 was $15,600.00, but that the debtor's bills were not paid regularly for more than one year prepetition. She also asserts that in the year preceding the filing of his bankruptcy the debtor habitually withdrew significant sums of money from his bank account, sometimes over $1,000.00 a month, but has failed to explain the use of this cash.

Contrary to plaintiff's allegations, the debtor's use of his income and his inability to satisfy his obligations from this income were sufficiently explained. It must first be noted that the debtor and his wife kept their incomes separated although both contributed all of their income to family expenses. Mrs. Gentry's income covered groceries, one monthly car payment, a couple of her personal credit accounts, and various expenses for their two sons. The debtor was responsible for all other household expenses. After deductions from his gross income for health insurance, car loans, and pension account loans, the debtor's monthly take-home pay excluding his annual wage dividend averaged $1,213.36 a month in 1995 and $1,323.23 per month in 1996. These wages did not stretch far enough to cover all of the debtor's expenses.

By 1995, the debtor was clearly in financial distress due to costs associated with caring for his terminally ill mother who suffered from liver and colon cancer. The debtor's mother lived with him and his wife for five years prior to her death on the day before Thanksgiving 1995, and required constant care much of which was not covered by health insurance. The debtor testified that he paid $200.00 per week for a woman to care for his mother while he and his wife were at work and paid for a registered nurse to visit his mother daily. Approximately one month before her death, debtor's mother had a cerebral hemorrhage which required her to be placed in a nursing home with a portion of the expense being borne by the debtor.

In addition to the expenses incurred to care for his mother, debtor was also trying to pay normal household expenses such as the mortgage on his home, utilities, and car and homeowners insurance. He supported one son in college from 1992 through the summer of 1996, and then his younger son when he started college beginning in August 1996, at a tuition cost of $3,600.00 per semester plus books. The debtor's financial difficulties were exasperated when his wife lost her job in 1995, and he had to assume for a period of time the expenses which his wife had previously been paying. When Mrs. Gentry eventually returned to work, she did so at a much lower hourly wage.

The state of the debtor's crumbling finances during this time is shown by an examination of the debtor's checking account statements. Beginning in April 1995, shortly before the first loan from the plaintiff to the debtor, he began incurring large overdraft and returned (*i.e.,* nonsufficient funds or NSF) check charges. The account statements evidence that overdraft and returned check charges of $240.00 were incurred in April 1995, $260.00 in overdraft and returned check charges in May, $380.00 in June, $100.00 in July, $300.00 in August, $660.00 in September, $240.00 in October, $140.00 in November, and $320.00 in December 1995. Small overdraft charges were also occurring on occasion in the bank account the debtor maintained with his mother, with $20.00 being charged by the bank in May 1995, and $120.00 in August 1995.

These overdrafts continued into 1996. The February 1996 bank statement shows overdraft and returned check charges totaling $220.00 in January and the March statement discloses similar charges of $240.00 in February. The overdrafts stopped for a while after the debtor's annual wage dividend check was deposited in March, but resumed in July 1996, with overdraft and returned check charges in that month of $200.00. Charges in August were $120.00, September charges were $100.00, October charges were $200.00, November bank charges were $220.00, and December 1996 overdraft and return check charges totaled $180.00. The debtor testified that because of his many returned checks, the water and phone companies would only accept payment from him in cash.

Exhibit 20, which was compiled by the plaintiff from the debtor's bank statements, reveals that as early as February 1995, the debtor was doing business with "checks-into-cash" providers whereby a person borrows money by giving the provider a personal check and in return receives cash for a sum less than the amount of the check with the difference being the fee or interest earned by the provider. The provider then holds the check for fourteen days at which time the borrower redeems the check by paying the provider the face amount of the check in cash. If the borrower does not have the necessary funds to redeem the check at the end of the redemption period, the check may be extended another two weeks upon the payment of an additional fee. There is no limit on the number of times that a borrower can obtain extensions as long as the necessary fee is paid each time.

The debtor testified that by October 1996, when, in his words, “things really began to get bad,” he was deeply in debt to eight check cashing service providers “owing every one up and down Stone Drive.” The debtor explained that because he did not have the money to redeem his checks from these providers, it was necessary for him to make the rounds to the different providers every two weeks in order to pay each the requisite renewal fee, which ranged from $40.00 to $120.00. The court notes that the debtor’s 1995 and 1996 bank statements reveal that anywhere from three to nine times a month the debtor obtained a “quick statement” from the bank to learn his bank balance at a charge of $1.00 per statement. The debtor’s constant need to ascertain his bank balance illustrates the precarious nature of the debtor’s finances as he struggled to satisfy the cash demands of his various creditors.

The bottom line is that there is no indication whatsoever that the debtor has hidden or improperly shielded his assets. It is not surprising that the debtor averaged cash withdrawals of several hundred dollars per month in 1996 since his renewal fees to checks-into-cash establishments which had to be paid in cash were running in the hundreds of dollars every two weeks and the debtor was required to pay his utilities in cash rather than by check. The court is convinced that Mr. Gentry is an honest debtor, who has satisfactorily explained the use of his income in the year prior to the filing of his bankruptcy petition and his inability to meet all of his financial obligations. Accordingly, the court finds no basis for a denial of discharge under § 727(a)(5).

IV.

11 U.S.C. § 727(a)(4)(A) provides that "[t]he court shall grant the debtor a discharge, unless ... the debtor knowingly and fraudulently, in or in connection with the case ... made a false oath or account." To deny a discharge under this subsection, plaintiff must prove that the debtor made a statement under oath, which he knew to be false, with the intent to defraud creditors and which related materially to the bankruptcy case. *See, e.g., Montey v. Maletta (In re Maletta)*, 159 B.R. 108, 112 (Bankr. D. Conn. 1993). In her pretrial statement, plaintiff alleges that the debtor violated § 727(a)(4) in the following respects:

(1) In response to <u>Question 3</u> of the "STATEMENT OF FINANCIAL

AFFAIRS," the debtor failed to disclose that on or about February 5, 1997, he paid Discover Card and Sears the sums of $2,200.00 and $1,400.00 respectively from the home mortgage loan that he obtained from Eastman Credit Union. The debtor also failed to disclose in response to Question 7 that on January 1, 1997, he paid $624.00 for his adult son's health insurance. Plaintiff asserts that the debtor also failed to disclose both items of information in the deposition he gave on June 10, 1997.

(2) In "SCHEDULE A—REAL PROPERTY," the debtor listed the total market value of his residence at $43,400.00, even though he signed an agreement to purchase the house for $58,755.62, the loan application reflected a value of $85,000.00, the house is insured for $93,000.00, and in his deposition he opined that his home was worth $60,000.00 to $61,000.00.

(3) In response to Item 2 on "SCHEDULE B—PERSONAL PROPERTY," the debtor stated that on March 18, 1997, he had $30.95 in his bank checking account even though he actually had $2,044.91 in the account on that day.

(4) In Schedule B, the debtor listed $1,100.00 as the total value of his personal property, with the exclusion of checking accounts, vehicles, an unliquidated claim and pension, even though he had insurance on his household personalty in the face amount of $69,750.00.

(5) The only pension or profit sharing account listed by the debtor in response to Item 11 of Schedule B was an “Eastman pension” with a stated market value of $4,271.00. However, the debtor had three pension and profit sharing accounts: a savings and investment plan (SIP) worth $1,096.78, an employee stock ownership account (EIP/ESOP) with a value of $10,876.11, and a lump sum retirement account known as HRAP with a value of $220,335.00 as of January 1, 1998. Plaintiff also notes that the debtor is eligible for retirement either immediately or in the very near future.

(6) The debtor listed an obligation to Discover Card in “SCHEDULE F—CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS” even though the debt had been paid in full on or about February 5, 1997, and thus was not a liability of the debtor at the time of his bankruptcy filing.

(7) In “SCHEDULE I—CURRENT INCOME OF INDIVIDUAL DEBTOR,” the debtor listed his monthly wages as $3,271.67 which if multiplied by twelve produces an annual income of $39,260.00. However, debtor’s income in 1996 and 1997 was $46,279.77 and $43,895.08 respectively.

(8) In “SCHEDULE J—CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR,” the debtor listed as a budget item $410.00 per month for his son’s college tuition even though the son was not

attending college when the bankruptcy case was filed.

Before addressing these allegations individually, it is important to note the events of the three months prior to the debtor's bankruptcy filing on March 21, 1997. By October 1996, the debtor was in severe financial distress: bank overdraft and returned check charges were running $200.00 a month; eight deferred service providers were being paid renewal fees biweekly; the debtor's second son was in college; the debtor had made no mortgage payments on his home all year; and plaintiff had requested payment of $1,000.00 of her loan. The debtor testified that he began losing weight and feeling tired and stressed all the time. In December 1996, after the debtor's older son was married and expecting a child, it was learned that the three month old fetus had an open spine and thus had to be aborted. On Friday, December 27, 1996, the debtor had such a severe headache that his wife took him to the hospital emergency room, where he received medication and spent the weekend at home in bed. On Monday, December 30, 1996, the debtor became dizzy while at work, started having pain in the back of his head, and collapsed down a flight of stairs. He was taken to the hospital by ambulance and diagnosed with severe depression, panic anxiety, and chemical imbalance. The debtor's wife testified that after being notified of her husband's collapse, she went to the hospital where she found him rolled up in a ball, talking incoherently, and unable to recognize her. In layman's terms, the debtor had a nervous breakdown which according to his doctors had been brought on by fatigue and stress. Mr. Gentry was released from the hospital on Thursday, January 2, 1997, four days after his admission, but did not return to work until March 24, 1997.

Prior to her husband's admission to the hospital, Mrs. Gentry knew nothing about his financial problems. The debtor paid the household bills and personally maintained the checking account. In fact it was a household rule that only the debtor could remove the mail from the mailbox. What Mrs. Gentry thought was a stable financial picture crumbled when the debtor was no longer able to keep his creditors at bay. During the debtor's brief hospital stay, his son's car was repossessed, bill collectors came to the hospital demanding payment, and check cashing providers began calling the Gentrys' home, threatening to have the debtor arrested for nonpayment. Alarmed by the onslaught of collection action, Mrs. Gentry telephoned F.T.B. Mortgage Services, their home mortgage holder, on New Year's Eve, the day after the debtor's hospital admission, to inquire as to the payment status of their mortgage. She learned that unbeknownst to her the mortgage holder had foreclosed in

September and that they were soon to be evicted from their home. After being advised by a friend that there were persons at Eastman Credit Union who might could help her, Mrs. Gentry gathered all of the letters, bills, and documents from her husband's desk and took them to the credit union where she spread the three full bags of correspondence on the conference table. Upon sorting through the documentation and analyzing the Gentrys' financial situation, the credit union telephoned Mrs. Gentry on the day after she got her husband out of the hospital, and advised her that it could give them a loan in the amount of $5,000.00 using the couple's 1987 Mazda automobile as collateral since it was almost paid off. They told her, however, that it was necessary for both her and the debtor to come to the credit union and sign the requisite paperwork. Mrs. Gentry testified that she loaded her husband in the car, even though he was still heavily medicated, took him to Eastman Credit Union and upon obtaining the loan proceeds, drove around to all of the check cashing places and businesses holding NSF checks she knew of to repay them. Her information at the time was based on telephone calls and letters she had found in the debtor's desk since the debtor was in no condition to answer any questions and Mrs. Gentry had been cautioned by her husband's doctors not to discuss finances with him. Mrs. Gentry testified that she was able to redeem checks at six check cashing places and replace nine insufficient funds checks that day, and that while she took care of all of the check cashing providers, the bounced checks continued to come in for some time, eventually totaling about $2,000.00. Mrs. Gentry testified that she took the remainder of the loan proceeds as far as they would go, paying two months of water and electric bills, telephone bills, garbage collection bills, and insurance premiums, having learning that the debtor had allowed their automobile and homeowners' insurance to expire some time previously. Unfortunately, there was not sufficient funds to enable the Gentrys' younger son to return to college in January for the winter semester. Instead, he stayed home to take care for his father and worked part time at a landscape nursery.

Eastman Credit Union also came through for the Gentrys with respect to their home by extending them a loan for the repurchase of their residence from F.T.B. Mortgages Services. Mrs. Gentry testified that she did not know until the day before the loan documentation was signed on February 5, 1997, that they would be able to stop the scheduled eviction and save their home.

Notwithstanding the close friendship between plaintiff and the debtor, she filed her collection suit against him on January

7, 1997, five days after he was released from the hospital. The first hearing set for January 29, 1997, was rescheduled for February 12, 1997, at the debtor's request due to his ill health. When the parties met in court on the twelfth, debtor offered to repay her at the rate of $50.00 to $100.00 a month, stating that this was all he could afford. Plaintiff refused the offer. Also during this time, the debtor was sued by Indian Ridge Animal Hospital for collection of a veterinarian bill. A judgment in the amount of $220.80 was subsequently rendered against the debtor.

The court will first address plaintiff's allegation that the debtor failed to disclose in response to <u>Question 3</u> the payments to Sears and Discover Card aggregating more than $600.00 in the 90 days preceding his bankruptcy filing. Plaintiff notes that <u>Exhibit 14</u>, which is the settlement statement dated February 5, 1997, for the Gentrys' loan to repurchase their home, indicates that the sums of $1,400.00 and $2,200.00 were disbursed to Sears and Discover Card, respectively, out of the loan proceeds. Mrs. Gentry testified, however, that checks in these amounts were written payable to these creditors or the Gentrys in the alternative, and that rather than disbursing the checks to these creditors, she cashed the checks and paid only $900.00 to Sears, using the remainder to pay the bills that continued to come in, to buy new tires, and to pay for a new clutch for one of their automobiles. The debtor testified that he did not disclose the $900.00 payment to Sears in his Statement of Financial Affairs because he did not know about it. Mrs. Gentry testified that after her husband became ill, she did not discuss finances with him unless it was absolutely necessary since she was trying to get him well so he could return to work and he would become agitated whenever finances were discussed. Furthermore, the testimony established that the Sears account was in Mrs. Gentry’s name only. Because both the debtor and his wife were extremely credible and there was no evidence contradicting their testimony with respect to these matters, plaintiff’s allegations that the debtor knowingly and fraudulently failed to disclose payments to Sears and Discover Card are without merit.

With respect to the debtor’s failure to disclose in response to Question 7 of the Statement of Financial Affairs that he paid a $624.00 health insurance premium for his adult son in January 1997, the debtor testified that it did not occur to him that this was a gift that needed to be disclosed since his son was unmarried and still living at home at the time the debtor was billed for the premium. While technically the payment was a gift that should have been disclosed, there is no evidence that the debtor intentionally omitted this information with the intent to defraud his creditors.

Regarding the proper valuation of the Gentrys' home, the debtor testified that he was unaware of the value for which his wife had insured the real property since she obtained this insurance while he was still in the hospital. He stated that the value he placed on his home in Schedule A was obtained from Form 1099-A which had been sent to the Internal Revenue Service by F.T.B. Mortgage Services. This form indicated that on September 26, 1996, when F.T.B. Mortgage Services acquired the property from the debtor and his wife in foreclosure, the fair market value of the property was $43,400.00. The debtor testified that he thought that this was the appropriate value for him to use since it was the value set forth in an official document, even though he personally believed that the house was worth $60,000.00. With regard to the $85,000.00 valuation set forth in the loan application of February 5, 1997, Mrs. Gentry testified that Eastman Credit Union had placed this value on the property to enable them to borrow as much as possible and that she had no idea how much money she would receive from the loan until the day of the loan closing. In response to questioning from plaintiff's counsel, Mrs. Gentry admitted that she disagreed with the credit union's valuation, but signed the application nevertheless, explaining that when you are desperate and trying to save your home you will just about sign anything.

The court is not persuaded that the debtor knew the valuation which he placed in his schedules was false or that the valuation was made with the intent to defraud his creditors. It was not unreasonable for the debtor to conclude that the valuation submitted to the Internal Revenue Service by his mortgage holder was the “official” value or one that had some legal significance, regardless of whether he personally disagreed with the valuation. Furthermore, notwithstanding all of the different valuations that were referenced by the plaintiff as evidence that the debtor’s scheduled value was incorrect, there is no indication that any of them were based on an appraisal such that the debtor should have given more weight to that particular valuation rather than the one set forth in the IRS form. In the court’s view, the best evidence of valuation was the price the debtors paid F.T.B. Mortgage Services on February 5, 1997, to repurchase their home, $58,755.62, especially in light of the pictures introduced into evidence showing the dilapidated condition of the house. Finally, only if the extremely high valuations were correct would the debtor benefit from a misrepresentation as to value since Eastman Credit Union has a lien on the residence to secure a debt of $63,000.00. From the evidence submitted to the court, these high valuations seem unlikely to be accurate. Accordingly, the court concludes that the debtor's scheduled real property valuation does not constitute a knowing and fraudulent false oath.

The court reaches a similar conclusion regarding the checking account balance set forth by the debtor in Schedule B. The debtor testified that his attorney gave him copies of the bankruptcy schedules to fill out and return to be typed. On March 10, 1997, the day debtor was completing his schedules, he went to his bank and obtained a quick statement to ascertain the bank balance. It was this amount that the debtor placed in his schedules and debtor testified that it did not occur to him to obtain an updated balance when he went to his lawyer's office on March 18, 1997, to sign the typed forms. Again, the court found the debtor to be credible and there is no evidence that would lead the court to believe that the debtor intentionally included a false amount on his schedules with the intent to defraud his creditors. Furthermore, there was no prejudice to creditors from the misinformation since the correct amount in the debtor's bank account on March 18, 1997, would also come within the debtor's available personal property exemption.

With regard to the alleged inaccurate valuation of the debtor's household goods and furnishings, the only evidence presented which would contradict the debtor’s valuation of $1,100.00 was the value for which the personalty was insured. This evidence alone does not establish the falsity of the debtor’s valuation since insurance of this type is usually replacement value rather than current market value. The debtor testified that he was advised to value the assets at what he thought he could sell them for and had discussed the value of many of the items with his wife to learn how long they had owned the articles, their purchase prices, and her opinion of value. The court is not persuaded that the values scheduled by the debtor are false and therefore they do not provide a basis for a denial of discharge under § 727(a)(5).

The court is somewhat disturbed by the debtor’s failure to fully disclose in his original schedules all of his interests in pension and profit sharing plans, even though these interests are exempt from the claims of creditors. On February 24, 1998, the day before trial, the debtor did file an amended Schedule B, setting forth all three of his pension and retirement accounts. The debtor testified that he knew at the time he completed his original schedules that he had three separate pension accounts, his SIP, ESOP, and HRAP. The “Eastman pension” listed in his original schedules was the SIP and the ESOP accounts added together and divided by two since it was understanding that his wife has one-half interest in the funds. The debtor testified that before filling out his schedules, he obtained a statement from his employer showing the exact amount in these two accounts. He stated that it did not occur to him to schedule his lump sum retirement account, the HRAP, because he makes no contribution to this account and is not eligible to receive any of the benefits until retirement, although he admitted on cross-examination that he knew his interest in the account was vested.

While the debtor's Schedule B was false in the sense that it failed to disclose specifically all of the debtor's retirement accounts, there is no evidence that the information was purposely not revealed so that creditors could be defrauded. Accordingly, the court finds no basis for a denial of discharge under § 727(a)(5) based on these omissions.

Plaintiff's allegation that the debtor knowingly and fraudulently scheduled a debt to Discover Card even though the debt had been paid in full prior to bankruptcy is without foundation. The evidence undisputedly established that Discover Card had not been paid out of the loan from Eastman Credit Union and that the debt was still owing when the debtor commenced his bankruptcy proceeding. The debt was therefore properly scheduled.

With respect to the allegation that debtor falsely listed his monthly income in Schedule I because the amount listed if multiplied by twelve would equal annual income of $39,260.00 when in fact the debtor’s 1996 income was $46,279.77, again the evidence reveals no intent to mislead or defraud. The debtor testified that to arrive at his monthly income, he took the base rate of pay on his last pay statement, multiplied it by 26 since he is paid biweekly, and then divided this amount by twelve to produce a monthly current income figure. The debtor stated that he did not add any additional amount for the annual wage dividend since these bonuses are not guaranteed, although admittedly they have always been given albeit in varying amounts. While the debtor correctly computed his current monthly income, the possibility of the bonus should have been disclosed in answer to the question at the end of Schedule I, which asks if any increase or decrease of more than 10% is anticipated within the year following the date of filing. Nonetheless, the debtor’s failure to list this information appears unintentional. The debtor appeared sincere in his efforts to properly and accurately prepare his schedules and the absence of any intent to mislead in this regard is indicated by the fact that the debtor accurately listed his annual income, including the wage dividends, for the two years preceding the filing of his petition in response to <u>Question 1</u> of the

Statement of Financial Affairs.

The debtor’s inclusion of $410.00 for his son’s tuition as a current expenditure was not improper even though the debtor’s son was not currently a student at the time the bankruptcy case was filed. The son had been in college prior to the debtor’s illness and had planned to return in January 1997, but did not do so because of lack of money and his father’s ill health. The son resumed college in April 1997, but at a local community college, rather than at Limestone College, the private school he had attended in the fall. The $410.00 amount scheduled by the debtor as a monthly expense was based on the sums the debtor had previously paid for his son to attend Limestone College, with this number divided by twelve. The debtor testified that he hoped his son would return to Limestone College since he had received a small soccer scholarship from the school. Although the debtor should have clearly delineated on Schedule J that the monthly tuition amount was an anticipated expense rather than a current one, the court finds no fraudulent intent from his mere failure to do so.

V.

Lastly, the court turns to plaintiff’s motion to dismiss under 11 U.S.C. § 707(a) for lack of good faith. Section 707(a) of the Bankruptcy Code provides that:

> The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—
> (1) unreasonable delay by the debtor that is prejudicial to creditors;
> (2) nonpayment of any fees or charges required under chapter 123 of title 28, and
> (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

Although lack of good faith is not specifically listed as a ground for dismissal under § 707(a), the Sixth Circuit Court of Appeals has recognized that the word “including” as used in the preamble to § 707(a) “is not meant to be a limiting word” and that grounds other than those delineated in the statute may provide a basis for dismissal when cause exists. *Indus. Ins. Serv. Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1126 (6th Cir. 1991). In *Zick,* the court concluded that a good faith requirement is inherent in the purposes of bankruptcy relief and therefore “lack of good faith is a valid basis of decision in a ‘for cause’ dismissal by a bankruptcy court.” *Id.* at 1127. As such, the Sixth Circuit upheld the bankruptcy court’s dismissal of the chapter 7 case which had been based on (1) the debtor’s manipulations reducing his creditors to one; (2) the debtor’s failure to make significant lifestyle adjustments or efforts to repay; (3) the fact that the petition was clearly filed in response to a creditor obtaining a mediation award; and (4) the unfairness of the debtor's use of chapter 7 under the facts of the case. *Id.* at 1128. The *Zick* court cautioned, however, that:

> Dismissal based on lack of good faith must be undertaken on an *ad hoc* basis. [Citation omitted.] It should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence.

Id. at 1129.

In the instant case, plaintiff asserts that many of the factors in *Zick* which led to a finding of bad faith are also present herein. She alleges that by paying off numerous creditors prior to his bankruptcy filing and reaffirming his Eastman Credit Union obligations in the bankruptcy, the debtor has manipulated his liabilities to only two significant obligations, the debt to the plaintiff and his mother's funeral bill. Plaintiff further contends that the debtor filed this chapter 7 case in response to her judgment and that both before and after the judgment date, the debtor made no offers of payment and did not seek a "slow pay" order to pay the judgment in installments in lieu of garnishment. Finally, plaintiff asserts that all of the allegations discussed above which form the basis for her contention that discharge and dischargeability should be denied also provide grounds for a finding of lack of good faith.

Contrary to plaintiff's assertions, this case is completely dissimilar from *Zick*. Zick's $600,000.00 obligation to his former employer arose out of his malicious breach of a noncompetition agreement. *Id.* at 1129. The debtor's debts, including those owed to plaintiff, arose from the financial strain placed on the debtor and his family by his terminally ill mother, rather than from conduct "akin to fraud, misconduct, or gross negligence." Zick's chapter 7 case was filed solely to avoid payment of the $600,000.00 mediation award and there was no indication that Zick was otherwise experiencing financial problems. His only other liabilities were debts to his wife, mother and attorney, the legitimacy of which was questioned by the court since Zick failed to specify the exact basis of the obligations. *Id*. Although the present case was prompted by plaintiff's judgment and garnishment, undisputedly the debtor had been staggering under the weight of his financial problems for some time and was in legitimate need of bankruptcy relief. Furthermore, with more than half of the debtor's take-home pay being garnished by the plaintiff, the debtor was left with insufficient funds to pay his other financial obligations and take care of his family. It is understandable why the debtor believed that he had no choice but to seek bankruptcy relief.

The fact that numerous debts, other than that owed to the plaintiff, were paid off by the debtor’s wife during the ninety days prior to bankruptcy does not indicate a manipulation of debts to avoid paying the plaintiff. There is no indication that the debtor was planning to file bankruptcy and discharge the obligation to the plaintiff at the time these debts were paid. The majority of obligations paid were insufficient funds checks with implicit and, in some instances explicit, threat of criminal prosecution or payment to various check cashing authorities who were demanding payment and charging interest at astronomical rates. Other debts were those which of their nature demanded immediate attention: past-due utility bills, homeowners’ and automobile insurance, and needed car repairs. Furthermore, it is not unusual, surprising, or suspicious that the debtor reaffirmed the secured Eastman Credit Union obligations. Homes and cars are routinely reaffirmed in chapter 7 cases and the debtor may have felt indebted to the credit union since it came to his rescue to save his home and to find money to satisfy pressing obligations.

Nor is there any indication in the present case of a lavish lifestyle or an absence of effort by the debtor to repay his obligations. Zick lived in an affluent community, his proprietorship income was $40,000.00 per month, and he had made no effort to repay the claim against him but instead simply filed bankruptcy as soon as judgment was rendered. The debtor, on the other hand, has a very modest home, drives a ten-year-old car, and only receives an average income. He struggled at least two years to get out from under his debt before filing bankruptcy, suffering a nervous breakdown from the strain of living under such pressure. His efforts to resolve the family’s financial difficulties were continued by Mrs. Gentry after her husband became ill. Contrary to the plaintiff’s allegations, these efforts included an attempt to satisfy his obligation to the plaintiff without the necessity of bankruptcy. Prior to the consensual judgment being entered, the debtor offered to repay plaintiff at the rate of $50.00 to $100.00 a month and showed her a list of his current bills and expenses to prove that was all he could afford to pay at the time. This offer was made when the debtor was still out of work due to his medical condition since the debtor did not return to work until March 24, 1997. Plaintiff rejected the offer stating that “it was nothing.” Mrs. Gentry testified that she offered to take on a second job to repay the plaintiff but knew that she was unlikely to earn more than an extra $100.00 per month, an amount which plaintiff had already refused as being inadequate. The debtor even talked to his psychologist about a second job but was not well enough to work his first one at the time, so that option was not feasible. He testified that he filed chapter 7 rather than chapter 13 because his income was not very much, his wife’s employment was unstable, and she was scheduled to lose her job in March of 1998.

As a final note, the court would add that the Sixth Circuit Court of Appeals stated in *Zick* that in evaluating good faith, it found particular merit in the “smell test” described in *Morgan Fiduciary, Ltd. v. Citizens and Southern Int’l Bank*, 95 B.R. 232, 234 (S.D. Fla. 1988), even though the possibility of appellate review necessitates that the objective factors relied on by a bankruptcy court be set out in the court’s decision. In *Morgan*, the district court cited with approval the bankruptcy court’s comment that the bankruptcy petition “fail[ed] to pass the ‘smell test,’” stating that:

> The late Irwin Younger, possibly the best lecturer—and, certainly the most enjoyable—on principles of law to judges and lawyers, observed that the most important item in the courtroom and all too seldom used is the judge’s nose. Any trial judge will inevitably come to the conclusion on occasion that a certain case or claim or defense has a bad odor. Simply put, a matter smells. Some smell so bad they stink.

> Judge Cristol's observation that Morgan's bankruptcy petition "fails to pass the 'smell test'" is hardly the arbitrary, unsupportable conclusion appellant asserts. The bankruptcy judge's conclusion is far from being merely a subjective olfactory whim; it is based on numerous objective factors, many of which were stated previously in this Order.
>
> This Court finds Judge Cristol's perception, and candor in expressing it, is a sound exercise in judicial decision-making. Based on the record of the objective factors supporting the bankruptcy judge's decision, buttressed by the judge's application of the "smell test," ... the judgment of the bankruptcy court is hereby AFFIRMED ....

Morgan Fiduciary, Ltd., 95 B.R. at 234.

All of the evidence discussed above leads the court to the overwhelming conclusion that the debtor filed his bankruptcy petition in good faith. This conclusion is buttressed by the court's sense that there is no hint of a bad odor in this case. The court found both the debtor and his wife to be highly credible, sincere and honest persons who have suffered misfortune in their lives and were in need of a financial fresh start. The plaintiff, on the other hand, seemed to be guided more by a desire for revenge due to the debtor's inability to repay her, rather than by a true belief that the debtor was dishonest and undeserving of a fresh start. Her efforts in this case which resulted in a full day trial for a relatively small debt persuade the court that the plaintiff's motive in pursuing this proceeding and raising every conceivable ground for relief was to punish the debtor notwithstanding their many years of friendship. In no respect does the present case represent an "egregious case that entail[s] concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence" as envisioned by the Sixth Circuit in *Zick*. The court has no doubt that the plaintiff and everyone in the courtroom hearing the evidence readily knew this. Accordingly, the court holds that the plaintiff's motion to dismiss for lack of good faith is completely without merit and should be denied.

VI.

The foregoing constitutes the court's findings of facts and conclusions of law pursuant to Fed. R. Bankr. P. 7052. An order will be entered contemporaneously with the filing of this memorandum opinion dismissing the plaintiff's amended complaint. An order will also be entered in the debtor's underlying bankruptcy case denying the plaintiff's motion to dismiss.

ENTER: May 1, 1998

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE