ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U S BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
NOV - 9 2001
TAWANA C. MARSHALL, CLERK
By
Deputy

IN RE:	§	
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SEARCY FERGUSON, JR.,	§	CASE NO. 00-33268-SAF-7
DEBTOR.	§	
	§	
SMS FINANCIAL, L.L.C.,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 01-3276
	§	
SEARCY FERGUSON, JR.,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

SMS Financial, L.L.C., moves the court for summary judgment denying the discharge of Searcy Ferguson, Jr., the debtor. Ferguson opposes the motion. The court conducted a hearing on the motion on September 10, 2001.

SMS objects to Ferguson's discharge pursuant to 11 U.S.C. §727(a)(4)(A), (a)(4)(D), and (a)(6)(A), contending: (1) that Ferguson made a false oath concerning the ownership of the stock of S. M. Ferguson, Jr., Inc., and his income and expenses; (2) that Ferguson failed to comply with a court order; and (3) that

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Ferguson failed to provide information regarding operating reports. Ferguson counters that the summary judgment evidence compels a trial on each ground.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus. Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 323. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita

Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

SMS has lodged several objections to Ferguson's summary judgment evidence. Ferguson, in turn, objects to an affidavit submitted on behalf of SMS. Except as otherwise addressed in this memorandum opinion, the objections are all overruled.

Under §727(a)(4)(A), the debtor may not obtain a discharge if the debtor knowingly and fraudulently, in connection with a bankruptcy case, made a false oath. See 11 U.S.C. §727(a)(4)(A). To establish that Ferguson made a false oath, SMS must show: (1) that Ferguson made a false statement under oath; (2) that Ferguson knew the statement was false; (3) that Ferguson made the statement with a fraudulent intent; and (4) that the statement is material to the bankruptcy case. Matter of Beaubouef, 966 F.2d 174, 178 (5th Cir. 1992). To be material, the statement must bear a relationship to the debtor's business transactions or estate, or concern the discovery of assets, business dealings or the existence or disposition of his property. Id. A debtor intends to defraud his bankruptcy estate if he makes the false statement with a "reckless indifference to the truth." In re Sholdra, 249 F.3d 380, 382 (5th Cir. 2001); Beaubouef, 966 F.2d at 178. Reckless indifference may be established by circum-

stantial evidence. Sholdra, 249 F.3d at 382.

Under §727(a)(4)(D), the debtor may not obtain a discharge if the debtor knowingly and fraudulently, in connection with a bankruptcy case, withholds any recorded information relating to the debtor's property or financial affairs from an officer of the bankruptcy estate entitled to possession under the Bankruptcy Code. See 11 U.S.C. §727(a)(4)(D).

In this case, Ferguson filed a petition for relief under Chapter 11 of the Bankruptcy Code on December 21, 1999. In his bankruptcy schedules, dated January 20, 2000, and filed under oath, Ferguson stated that he owned the stock of Ferguson, Inc., valued at $350,000, and Baltic Royalty Corporation, valued at $1,000. Ferguson also scheduled his mother, Margaret B. Ferguson-Miller, as a secured creditor, with a claim of $1,000,000 secured by the stock of the corporations.

SMS contends that Ferguson made a false oath and withheld recorded information concerning his ownership of the stock of S. M. Ferguson, Jr., Inc., and its subsidiary corporation, Baltic Royalty Corporation. Ferguson concedes that his schedules are partially false. He also acknowledges that his mother does not hold a secured claim for $1,000,000. Rather, he avers that he borrowed $495,000 from his father, evidenced by multiple notes.

At his father's death, the notes passed to the probate estate. Subsequently, the probate estate transferred its assets to the Searcy M. Ferguson, Sr., Testamentary Trust, of which Searcy M. Ferguson, Jr., his sister, and his mother are the beneficiaries. Ferguson and his mother aver that he replaced the multiple notes with a single note for $495,000. However, the inventory of the probate estate reflects neither a debt owed by Ferguson nor any note. Ferguson, his mother, and his sister now concede that notes to his father or his father's estate cannot be found.

On February 1, 1995, Ferguson executed and delivered to the Trust a handwritten document which states:

> For and in consideration of good and valuable consideration, including certain outstanding promissory notes of approximately $495,000, plus accrued interest at the rate of 6 % per annum, I hereby transfer, sell and convey to the Searcy M. Ferguson, Sr. Estate and/or Testamentary Trust, all my 1,000 shares of capital stock in Searcy M. Ferguson, Jr., Inc., a Texas corporation, subject to said stock being reassigned to me once the debt is paid in full.

Ferguson is an attorney. He drafted the February 1, 1995, document. Ferguson construed the document as granting a security interest in the corporation's stock to the Trust. For that reason, he scheduled the stock as an asset of his bankruptcy estate but listed his mother, as a beneficiary of the trust, as a secured creditor. But, his bankruptcy attorney construed the

document differently. Although recognizing the ambiguity of the document, his bankruptcy attorney advised Ferguson that the document amounted to a transfer of the stock to the Trust. Thereupon, Ferguson filed amended schedules, dated September 5, 2000, removing the stock in both corporations from his schedules and removing his mother as a secured creditor, although she was scheduled as an unsecured creditor. Consistent with this theory, Ferguson did not schedule the trust as a creditor.

By an order entered November 28, 2000, the court converted Ferguson's bankruptcy case to a case under Chapter 7 of the Bankruptcy Code. Ferguson filed Chapter 7 schedules in which he (1) did not list the stock of the corporations as an asset; (2) did not schedule his mother as a secured creditor; and (3) did not schedule a debt to the Trust.

Ferguson avers that he borrowed money from his father, evidenced by multiple notes. Ferguson also avers that he replaced the multiple notes with a single note to the Trust. His mother confirms that account. But, the probate estate did not report a debt owed by Ferguson. Moreover, no note can be found. Therefore, there is a genuine issue of material fact of whether the Trust had a claim against Ferguson.

Ferguson, an attorney and the drafter of the document, originally scheduled the stock as property of his bankruptcy estate. His 1995, 1996, and 1997 tax returns reflect ownership of the stock as a Sub Chapter S corporation. The Trust's 1999 1041 income tax return does not list ownership of the stock. The K-1 schedules for Ferguson, his mother and his sister do not reflect income from the stock as an asset of the Trust. The 1993 probate estate inventory scheduled no debt owed by Ferguson. Bankruptcy counsel's reading of the document appears to write out the phrase beginning "subject to," thereby violating the maxim to give meaning to every word in a document. Ferguson avers that he amended his schedules based on the advice of counsel. Assuming the existence of a debt to his father and subsequently his father's estate, there is genuine issue of material fact of whether Ferguson granted a security interest in the corporation's stock, thereby retaining ownership of the stock and making it property of the estate, or whether he transferred title of the stock to the Trust. On this summary judgment record, the ambiguity of the handwritten document compels resolution at trial.

Additionally, at least one of the schedules contains a false statement. There is circumstantial evidence of a fraud. There

is either a pledge of a security interest or the transfer of an asset, scheduled with a value of $350,000 but presently worth $500,000, in exchange for a debt which cannot be documented. The result, a $500,000 asset available for the beneficiaries of a trust, who happen to be the debtor, his sister and his mother. The existence of the asset and the debt are material to Ferguson's bankruptcy case.

On this summary judgment record, there is a genuine issue of material fact of whether Ferguson made one or more statements in his schedules with a fraudulent intent. In deciding that issue at trial, the court will consider whether Ferguson filed either his schedules or his amended schedules with reckless indifference to the truth, which may amount to the requisite intent to deceive. See Sholdra, 249 F.3d at 382.

On July 20, 2001, Ferguson's Chapter 7 trustee, Scott Seidel, filed an adversary proceeding against Ferguson, his mother, his sister, and the Trust to recover the value of Ferguson, Inc., and its Baltic subsidiary, and for injunctive relief. Adv. Proc. No. 01-3457. Because of the relationship of the issues to be adjudicated, the parties agreed at the hearing on the summary judgment motion, that the court could decline to

resolve the discharge on summary judgment in favor of a trial in both adversary proceedings.

SMS also contends that Ferguson made a false oath and withheld recorded information concerning his income and expenses. In his schedules dated July 20, 2000, and filed under oath, Ferguson reported on Schedule I monthly income of $13,600 and reported on Schedule J monthly expenses of $9,100. On his amended schedules dated September 5, 2000, Ferguson reported on Schedule I monthly income of $12,600 and on Schedule J monthly expenses of $13,600. On his Chapter 7 schedules filed under oath in February 2001, Ferguson reported on Schedule I monthly income of $12,600 and on Schedule J monthly expenses of $13,600. Ferguson avers that the schedules were accurate at the time.

But, SMS submits summary judgment evidence purporting to demonstrate that Ferguson, Inc., paid monthly expenses for Ferguson averaging $23,362, which was unreported on all of the schedules. SMS relies on the affidavit of Maclain Scott Looper. Looper, a graduate of the University of Michigan with a Bachelor of Fine Arts degree, reviewed Ferguson's books and records as well as that of the corporations, and assembled an analysis of expenditures by the corporations. Looper identified the

expenditures as personal for Ferguson, business or unknown. Looper indicated the reason for each identification.

Ferguson objects to the affidavit, contending that SMS is using Looper as an expert without identifying him as an expert. Ferguson also complains that Looper lacks eligibility to be qualified as an expert. SMS responds that the court can accept Looper's layman's review of the evidence, by considering the underlying evidence itself.

The court can indeed review the underlying evidence to determine if the corporations had been making personal expenditures for Ferguson that should have been reported on his schedules. But, that is an exercise for trial, with Ferguson on the witness stand to explain the underlying corporate records. The task may be tedious or onerous, but it cannot be accomplished without a trial.

SMS does not tender the Looper affidavit as an expert. The court concludes that the underlying evidence must be examined at trial. Thus, the court concludes that there is a genuine issue of material fact regarding the Schedules I and J.

Under §727(a)(6)(A), the debtor shall not receive a discharge if the debtor, in the bankruptcy case, refused to obey any lawful order of the court, other than an order to respond to

a material question or to testify. By order entered August 22, 2000, the court directed Ferguson to "fully and completely prepare operating reports in the form attached" to the order "for each month since the filing of this bankruptcy proceeding and submit reports for the months of June and July 2000 within 10 days from entry of this Order, and shall submit reports for each month from December 1999 through May 2000 within thirty days of entry of this Order." Ferguson did not fully comply with that order.

By order entered November 28, 2000, the court converted Ferguson's case from a case under Chapter 11 of the Bankruptcy Code to a case under Chapter 7. Because Ferguson did not timely file the required reports, the court found that Ferguson failed to comply with the order.

SMS contends that, as a result, Ferguson must be denied his discharge under §727(a)(6). Ferguson responds that he did not refuse to comply with the order, but rather failed to comply completely. Ferguson avers that the reports filed in June 2000 contained errors that should be excused because of his radiation treatments for prostate cancer during the time. He also avers that in September 2000 he filed revised monthly operating reports that were "approximately correct at the time."

Ferguson had been proceeding under Chapter 11 as a debtor in possession, with fiduciary duties to his bankruptcy estate. In addition, he is an attorney, owing the highest ethical and professional standards to this court. He lost the possibility of restructuring his debts in a Chapter 11 case, in part, because of his inaccurate and untimely operating reports. His ability to obtain a discharge is now at stake.

There is a genuine issue of material fact as to whether Ferguson refused to comply with the court order. If he did, then the court must consider the effect of the conversion of the case as a sanction already imposed. In addition, by order entered October 29, 2001, in adversary proceeding no. 01-3457, the court observed that non-compliance with that order, which requires completion of operating reports, may be grounds to deny Ferguson's discharge, thereby suggesting that the issue under §727(a)(6)(A) remain open. For these reasons, the court will conduct a trial on the §727(a)(6)(A) issue as well.

Based on the foregoing,

IT IS ORDERED that the motion for summary judgment is **DENIED**.

Dated this 8th day of November, 2001.

Steven A. Felsenthal
United States Bankruptcy Judge