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

IN RE:	§	
	§	
WYNNELL COLLINS,	§	CASE NO. 01-30320-SAF-7
DEBTOR.	§	
	§	
ROBERT K. DOWD,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 02-3113
	§	
WYNNELL COLLINS,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

In this adversary proceeding, Robert K. Dowd, the plaintiff, seeks to vacate the discharge granted to Wynnell Collins, the debtor, on allegations of failure to report entitlement to property pursuant to 11 U.S.C. § 727(d)(2). The court conducted a trial on January 24, 2003. At the close of the plaintiff's case, the court granted Collins' motion for judgment.

The revocation of a discharge involves a core matter over which this court has jurisdiction to enter a final judgment. 28 U.S.C. §§ 157(b)(2)(J) and 1334. This memorandum opinion

contains the court's findings of fact and conclusions of law. Bankruptcy Rule 7052.

The court's scheduling order entered April 23, 2002, required that the parties serve and file a pretrial order in compliance with Local District Court Rule 16.4. Collins complied with that requirement, but Dowd failed to comply. As a result, neither the court nor Collins received a statement of the issues submitted by Dowd for trial. The parties could not submit any stipulated facts. Collins could not prepare to address the precise issues of fact and law Dowd would present at trial. Dowd had been ill in the months before trial, but he had counsel representing him, including at the trial docket call. Dowd did not seek relief from the court's scheduling order and did not seek a time extension for preparing his portion of the pre-trial order. At trial, the court determined that Dowd should be sanctioned for failing to comply with the court's order. The court bases the amount of the sanction on the extra work of counsel for Collins caused by the lack of a pretrial order. Collins shall be awarded $500 attorney's fees to be paid by Dowd.

At trial, Dowd clarified that the adversary proceeding did not involve objections to the exemptions Collins claimed in her underlying bankruptcy case. In addition, Dowd specified that he was limiting his request for revocation of discharge under

§ 727(d)(2). In his complaint, Dowd alleged that Collins fraudulently delayed the entry of a divorce settlement to circumvent the reach of the bankruptcy estate; that Collins acquired or became entitled to acquire property of the estate which she knowingly and fraudulently withheld from the trustee; and that Collins failed to disclose assets.

Section 727(d)(2) of the Bankruptcy Code provides:

> (d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if--
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> . . .
>
> (2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee . . .

11 U.S.C. § 727(d)(2)(2002).

In order to revoke Collins' discharge, Dowd must establish that Collins acquired or became entitled to acquire property of the estate and knowingly and fraudulently failed to report or deliver the property to the trustee. Both elements of this test must be satisfied. Collins must have acquired or become entitled to acquire property of the estate. Collins' action must also have been taken with knowing intent to defraud the trustee. In re Bennett, 126 B.R. 869, 873 (Bankr. N.D. Tex. 1991).

In addition, if the party seeking revocation under § 727(d)(2) had knowledge of facts in time to file an objection to the discharge, the party will be estopped from seeking revocation of the discharge. Id.

Collins filed her petition for relief under Chapter 7 of the Bankruptcy Code on January 12, 2001. Before she filed her bankruptcy case, Collins had been involved in protracted, extensive and complex divorce proceedings. The divorce case was filed on November 19, 1997. Dowd, an attorney at law, represented Collins in her divorce case from June 8, 1998, to November 3, 1998. Dowd had access to Collins' financial records and property inventory during the period he represented Collins. Dowd learned through his representation of Collins that Collins and her husband Michael had extensive and valuable assets. Dale Hackbart, a former FBI agent, testified that he had worked with Collins and Dowd during the divorce to prepare property lists. Collins owed Dowd fees for his services, which remained unpaid at the time of the filing of the bankruptcy petition.

The divorce case remained pending at the time of the filing of the bankruptcy petition. On February 12, 2001, Collins filed a motion to lift the automatic stay to allow the divorce case to proceed in state court. Collins served the motion on the Chapter 7 trustee and on Dowd. By order of this court entered March 5,

2001, Collins obtained relief from the automatic stay to finalize the divorce case. Dowd knew of the entry of that order. A decree of divorce was entered by the state court on July 27, 2001.

Upon the filing of the bankruptcy case, Robert Milbank, Jr., was appointed interim trustee. Collins filed her bankruptcy schedules and statement of financial affairs on January 24, 2001. Milbank conducted a meeting of creditors on February 12, 2001. Collins appeared at the meeting of creditors with her bankruptcy attorney. Dowd appeared at the meeting of creditors through his attorney Eric Liepins.

Milbank resigned as trustee on March 21, 2001. Robert Newhouse was appointed trustee on March 21, 2001. Newhouse still serves as trustee. Collins filed amendments to her schedules and statement of financial affairs on April 10, 2001.

Dowd did not request an opportunity to examine Collins under Bankruptcy Rule 2004. The deadline for filing objections to Collins' discharge ran on April 13, 2001. Dowd did not request an extension of the time to file a complaint objecting to the discharge. No complaint objecting to discharge was filed. The court granted Collins' discharge on May 3, 2001. Dowd did not file this complaint until April 22, 2002.

In her schedules filed on January 24, 2001, Collins disclosed her pending divorce case, as well as litigation brought against her by Dowd and by Robert Holmes, both for unpaid attorney's fees. Under schedule B listing her personal property, Collins stated that she had furniture and household goods including books, pictures and collectibles, as disclosed on an attached list. However, the list was not attached. Collins had prepared the list and delivered the list to her bankruptcy attorney. Collins further disclosed that she claimed an interest in a life insurance policy on Michael's life, but recognized that she and her husband were in the process of obtaining a divorce. She claimed a one half interest in the sale proceeds of furniture in the divorce proceeding, but observed that recovery was remote. She stated that she was in possession of antique chairs, which she believed she was holding for another, namely, her husband.

Consequently, at the meeting of creditors, the trustee and Dowd knew that Collins was in the midst of divorce proceedings, and that her interest in property, including antique chairs and other furniture, was subject to claims made in the divorce proceeding. The trustee and Dowd knew, from her schedules, that Collins had referenced a list of personal property attached to the schedules. They knew the list was not attached. Indeed, Dowd knew from his representation of Collins the extent of the

property at issue in the divorce case. Dowd knew that prior to the bankruptcy case, Collins considered that she may have had an interest in the antique chairs. Collins offered the chairs to Dowd as payment for his outstanding fees. Dowd did not accept that offer. Both the trustee and Dowd, through his attorney Liepins, could have pursued Collins' disclosures and her interest in property at the meeting of creditors or by subsequent Rule 2004 examinations. Milbank announced at the meeting of creditors that he would continue his investigation of the case. Milbank, however, resigned as trustee. The United States Trustee appointed Newhouse to succeed Milbank. Actions or inactions by the trustee or Dowd in failing to pursue issues which they knew or should have known following the meeting of creditors cannot be attributed to Collins.

In her schedules Collins disclosed property interests greater than the exemption limits. The trustee was thus on notice by the meeting of creditors of assets to pursue. Dowd knew the extent of the property at issue in the divorce case.

At the time of the entry of the discharge, the state court had not yet entered a divorce decree. Dowd knew that. Dowd also knew that Collins had obtained relief from the automatic stay to pursue entry of a divorce decree. Dowd knew, therefore, that sometime after the discharge, the state court would complete its

work by entering a divorce decree. He knew the extent of the property interests at issue before the state court. The divorce decree would finally adjudicate the issue of separate property and the issue of the division of community property pursuant to state law. With the outcome of the divorce case pending, both the trustee and Dowd knew or should have known the extent of the property in play.

As part of the divorce decree, Michael was awarded all the personal property in his possession, with certain exceptions. In addition, Michael was awarded the antique chairs as well as other personal property, the list constituting an entire typewritten page, single spaced. The antique chairs covered payment of attorneys fees by Collins. Collins also paid Michael $25,000.

At trial, Dowd questioned Collins about certain specific property. Collins testified that the property went to Michael in the divorce. The property not specifically itemized as awarded to Michael was already in his possession, according to Collins' testimony. Dowd presented no evidence to the contrary. Dowd presented no evidence that the divorce decree had been the product of collusion or had been engineered to shield property from the bankruptcy estate. There is no evidence that Collins retained some kind of interest in the property awarded to Michael.

Collins did testify that she had a gold watch and two diamond stud earrings stolen from a hotel, when she left them near a swimming pool. While this testimony may reflect an act of negligence by Collins, it does not establish that Collins deliberately failed to report entitlement to property.

On this record, Dowd has not established that Collins acquired or became entitled to acquire property after the discharge by the divorce decree. To the contrary, the divorce decree awarded the subject property to her former husband, either as property in his possession or by specific provision in the divorce decree.

Dowd has not established that Collins delayed the divorce proceedings to somehow fraudulently keep property from the trustee. The divorce proceedings had been extensive, bitter and long-lasting. Collins obtained relief from the automatic stay to allow the divorce case to proceed while her bankruptcy case was pending. The trustee and Dowd knew the proceedings were pending during the bankruptcy case and would ultimately be resolved. Dowd knew the extent of the property at issue in the divorce case. The trustee and Dowd knew that property had to be addressed and divided, if community property. The trustee and Dowd would know that the division of community property would be subject to the Bankruptcy Code. Ultimately, the state court

addressed the property division. Dowd has not established that Collins delayed the resolution of the divorce case to knowingly and fraudulently shield any interest in property she had from the trustee.

In addition, Dowd must be estopped from seeking revocation of the discharge because he had knowledge of facts in time to file an objection to the discharge. Dowd knew the extent of the holdings of Collins and her husband. Collins scheduled property with a value greater than the exemption limits. Collins referenced a list of personal property attached to her schedules, that was not attached. Dowd through his bankruptcy attorney could have questioned Collins regarding the missing list at the meeting of creditors. Collins stated in her schedules that she was in possession of antique chairs that she believed belonged to Michael. Yet, Dowd knew that Collins had offered the chairs to him in satisfaction of his fees. Dowd could have questioned Collins regarding her interest in the chairs. Dowd knew that Collins obtained relief from the automatic stay to allow the divorce case to proceed. Dowd knew the divorce was bitter and protracted. Dowd knew that resolution would not come easily. Dowd therefore knew that resolution of separate property claims and division of community property could be prolonged and thereby effect the bankruptcy estate. Dowd also knew that the timing of

the end of the divorce case was uncertain. Yet Dowd requested no Rule 2004 examination of Collins. Dowd did not move to extend the time to file an objection to discharge to preserve issues or the ability to investigate pending the resolution of the divorce case. Dowd engaged in no discovery to determine if he had a basis to object to discharge.

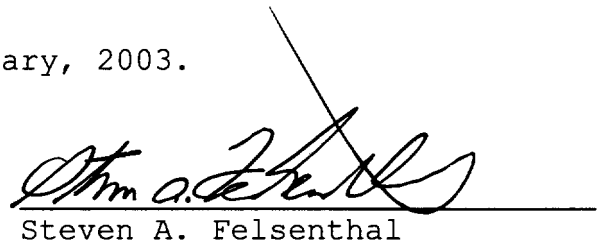
Dowd argues that the fraud occurred after the discharge and therefore he should not be estopped from prosecuting this revocation complaint. However, Dowd misses the point of the estoppel doctrine. Before the discharge, he knew the extent of Michael and the debtor's property. Dowd knew what had been disclosed in the schedules and he had a basis for investigating what property may have been ambiguously described or omitted from the schedules, if any. He knew the divorce case would ultimately address property issues. He had facts sufficient to pursue an objection to discharge.

Accordingly, at the close of the plaintiff's case, the court determined that Dowd failed to establish both elements of § 727(d)(2) and furthermore Collins established the application of the estoppel doctrine.

Based on the foregoing, counsel for Collins shall prepare a separate order of dismissal with an award to Collins of $500 for

attorney's fees for violation by Dowd of the court's scheduling order.

Dated this 28th day of February, 2003.



Steven A. Felsenthal
United States Bankruptcy Judge