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

ENTERED
MARSHALL, CLERK
THE DATE OF ENTRY IS
DOCKET

IN RE:	§	
	§	
ROBERT BRUCE ALLISON and	§	
KELLIE ANN ALLISON,	§	
	§	
Debtors.	§	CASE NO. 03-46458-DML-7

M.J. PIPELINE INSPECTION,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
ROBERT BRUCE ALLISION and	§	
KELLIE ANN ALLISION,	§	
	§	
Defendants.	§	ADV. NO. 03-4469-DML

MEMORANDUM OPINION

Before the court is M.J. Pipeline Inspection, Inc.'s ("Plaintiff") Complaint Objecting to Discharge of Debtors under § 727 of the Bankruptcy Code (the "Complaint") filed December 1, 2003. Debtor's [sic] Response to Complaint Objecting to Discharge of Debtor was filed January 12, 2004, by Robert Bruce Allison (individually, "Robert") and Kellie Ann Allison (individually, "Kellie") (collectively, "Defendants").

The parties' Joint Motion to Submit Claims to Court on Brief, filed August 2, 2004, was granted by the court. Pursuant to the court's Briefing Order entered August 3, 2004, the parties filed Plaintiff and Defendants' Joint Stipulation of Facts (the "Stipulation") on August 20, 2004;

Plaintiff's Motion for Judgment and Brief in Support Thereof ("Plaintiff's Motion") on August 27, 2004; Defendants' Response to Plaintiff's Motion and Defendants' Motion for Judgment and Brief in Support Thereof ("Defendants' Motion") on September 3, 2004; and Plaintiff's Reply to Defendants' Response to Plaintiff's Motion on September 10, 2004.

I. FACTUAL BACKGROUND

Pursuant to the Stipulation, the parties stipulate that:

1. Defendants were the sole shareholders of Kebo Services, Inc. ("Kebo");

2. Robert was Kebo's president;

3. Kebo filed for chapter 7 relief on February 28, 2003, Case No. 03-41959-BJH-7;

4. Kebo's chapter 7 schedules showed zero assets and approximately $3.6 million in unsecured debt;

5. Kebo's books and records were originally located at 8008 Camp Bowie Boulevard, Fort Worth, Texas, in an office shared with James Bowen ("Bowen"), who died in January 2003;

6. Bowen, Kebo's vice president, prepared Kebo's financial books and records;

7. Defendants continued to pay rent on Kebo's Camp Bowie location for several months after Bowen's death;

8. Robert appeared at Kebo's creditors' meeting held on May 13, 2003, and testified as Kebo's representative;

9. Plaintiff's current attorney attended Kebo's creditors' meeting as attorney for a third-party creditor;

10. John Litzler ("Litzler") was Kebo's chapter 7 trustee;

11. If Robert were called to testify, Robert would testify that:

    (a) at Kebo's May 13, 2003, creditors' meeting Robert provided Litzler with Kebo's federal income tax returns and copies of Kebo's check stubs for the three preceding years; and

(b) Litzler returned the income tax returns and check stubs to Robert at the conclusion of the creditors' meeting;

12. Sometime in May 2003, Bill Martin ("Martin"), Robert's associate, was authorized by Robert to remove Kebo's books and records from Kebo's Camp Bowie office for relocation to a barn owned by Martin;

13. Litzler's report of no assets/no distribution in Kebo's case was filed July 3, 2003;

14. Defendants filed for chapter 7 bankruptcy relief on July 10, 2003;

15. Plaintiff was listed as an unsecured creditor on Defendants' schedules and received notice of the filing of Defendants' chapter 7 case;

16. The shares of stock in Kebo owned by Defendants were not listed as an asset in Defendants' chapter 7 case;

17. Prior to Defendants' creditors' meeting on October 8, 2003, Robert authorized Martin to dispose of Kebo's books and records;

18. All of Kebo's books and records were disposed of or destroyed prior to Defendants' October 8, 2003, creditors' meeting;

19. Defendants' section 341 creditors' meeting was held on October 8, 2003, and Plaintiff questioned Defendants;

20. The Order Approving Trustee Report and Discharging Trustee in the Kebo case was entered by the clerk of this court on January 8, 2004; and

21. Kebo's chapter 7 bankruptcy case was closed on January 8, 2004.

II. DISCUSSION

Plaintiff's Complaint objecting to Defendants' discharge under section 727 of the Bankruptcy Code[1] was filed December 1, 2003. Plaintiff argues that Defendants' failure to preserve Kebo's financial records violates Code sections 727(a)(2)(B), 727(a)(3), 727(a)(4)(A),

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[1] 11 U.S.C. §§ 101-1330 (2004) (hereinafter referred to as the "Code").

727(a)(4)(D), and 727(a)(5). Plaintiff prays that Defendants' discharge in their related bankruptcy case, Case No. 03-46458-DML-7, be denied.

Defendants deny violating section 727 of the Code and specifically assert, *inter alia*, that (1) Robert sufficiently explained Kebo's loss of assets at Kebo's creditors' meeting; (2) Defendants had no duty to maintain Kebo's records; (3) Defendants produced all documents requested; (4) neither Litzler nor any other creditor requested any of Kebo's additional financial records; and (5) Defendants' financial condition is evident from the records and information available in this case. Defendants claim their interests in Kebo were not listed in the schedules because, by the time Defendants chapter 7 was filed, Kebo "had been liquidated in its Chapter 7 case, the stock was worthless and could in no way be considered an asset." Defendants ask the court to deny Plaintiff's Motion and overrule the objection to discharge.

A. <u>Robert</u>

In construing section 727 of the Code,[2] this court must adopt the plain meaning of the statute. *See Lamie v. United States Trustee*, ____ U.S. ____, 124 S. Ct. 1023, 1030 (2004) (concluding that when the language of a statute is plain and does not lead to an absurd result, the

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[2] Section 727(a)(3) provides:

> (a) the court shall grant the debtor a discharge, unless–
>
> > (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

Code § 727(a)(3).

sole function of the court is to enforce the statute according to its terms); *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (concluding that where resolution of a question of law turns on a statute, courts must look first to the statutory language); *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991) (finding that the fact that Congress may not have foreseen all the consequences of a statutory enactment is not sufficient reason for refusing to give effect to the statute's plain meaning); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (finding that if a statute's language is plain, the sole function of the courts is to enforce the statute according to its terms).

The unambiguous language of section 727(a)(3) requires no showing of knowing or fraudulent intent regarding the destruction of books and records. Section 727(a)(3) is distinct from other subsections of section 727, including sections 727(a)(2) and 727(a)(4), both of which specifically require a showing of intent or that the act was knowing and fraudulent. Moreover, like other provisions of section 727(a), section 727(a)(3) has a cognate in the Criminal Code, *i.e.*, 18 U.S.C. § 152(8). Section 152(8) requires that, to be a criminal offense, destruction of records must be knowing and fraudulent. The failure of Congress to limit in the same fashion the showing required for denial of discharge cannot be overlooked by the court. It is certainly likely, based on the other subsections of section 727 and on 18 U.S.C. § 152(8), that Congress intentionally required no showing of intent or fraud under section 727(a)(3). Even if Congress inadvertently left such a requirement out, it is not up to the court to add intent as an element of proof required under section 727(a)(3). The court is obligated to read and apply the statute – if Congress did not intend the result reached, there is nevertheless no reason to interpret the statute other than in accordance with its plain meaning. *See Wolas*, 502 U.S. at 158; *Toibb*, 501 U.S. at 164.

Here, Defendants neither dispute that Robert authorized Martin to dispose of Kebo's books and records nor offer any evidence that Robert's authorization for destruction of the records without authority of the court was justified under all the circumstances of the case. Although the records were Kebo's, they were in Defendants' possession and were pertinent to inquiries into Defendants' business affairs. *See* Code § 727(a)(7). Because no showing of knowing or fraudulent intent is required to establish a violation of section 727(a)(3) and application of the plain language of the statute does not lead to an absurd result, the court finds, to the extent applicable to Robert, that:

(1) Plaintiff's Motion should be, and hereby is, **GRANTED**;

(2) Defendant's Motion should be, and hereby is, **DENIED**; and

(3) Plaintiff's objection to Robert's discharge should be **SUSTAINED**.

B. <u>Kellie</u>

Conspicuous by its absence, however, is any evidence before the court that Kellie in any way participated in or could have prevented the destruction of Kebo's financial records or that Kellie intended to defraud Plaintiff, conceal property of the estate, or knowingly and fraudulently make a false oath or account in connection with the case. The court has not been presented with sufficient evidence to conclude that the schedules and statement of affairs in this case contained enough errors to demonstrate a reckless disregard for the truth under *Cadle Co. v. Mitchell (In re Mitchell)*, No. 03-10885, 204 U.S. App. LEXIS 13256 (5th Cir. June 28, 2004) or *United States Trustee v. Moschella (In re Moschella)*, No. 03-47690-DML-7, 2004 Bankr. LEXIS 1108 (Bankr. N.D. Tex. Aug. 9, 2004).

To the contrary, the parties' Stipulation specifically acknowledges Robert's individual role in authorizing the destruction of Kebo's financial documents; and Plaintiff's Motion acknowledges that Robert alone attested to and signed Kebo's bankruptcy papers. Moreover, Robert's deposition testimony confirms that Kellie was not at all involved in Kebo's business operations; and Kellie's bankruptcy schedules indicate that Kellie was a housewife. Finally, there is no evidence in the record to demonstrate that Kellie, ignorant of the business affairs and financial records of Kebo, had any reason to doubt that Robert, a sophisticated businessman who has owned at least three businesses in the telephone or utility construction industry since the late 1970s, was properly maintaining Kebo's financial records or that Kellie did not reasonably rely on Robert to maintain a proper record of their business and personal finances.

Consequently, because Plaintiff has failed to satisfy its *prima facie* burden under section 727[3] with respect to Kellie and the record indicates that (1) Kellie's reliance on Robert was reasonable; (2) Kellie had no knowledge of the details of Kebo's business affairs; (3) Kellie made no false statements under oath with fraudulent intent; and (4) Kellie had insufficient information or knowledge to satisfactorily explain any loss of assets or deficiency of assets to meet liabilities, the court finds, to the extent applicable to Kellie under all the circumstances of the case, that:

(1) Plaintiff's Motion should be, and hereby is, **DENIED**;

(2) Defendant's Motion should be, and hereby is, **GRANTED**; and

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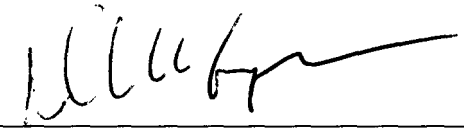
[3] *See Cadle Co. v. Terrell*, No. 4:01-CV-0399-E, 2001 U.S. Dist. LEXIS 21944, *12 (N.D. Tex. Jan. 7, 2001) (finding a *prima facie* case under section 727(a)(3) requires that the objecting creditor show that the debtor failed to maintain and preserve adequate records and that debtor's failure to do so makes it impossible to ascertain the debtor's financial condition and material business transactions) (citing *Meridian Bank v. Alten*, 958 F.2d 1226, 1230 (3d Cir. 1992)). *See also Lansdown v. Cox (In re Cox)*, 41 F.3d 1294, 1296 (9th Cir. 1994) (same).

(3) Plaintiff's objection to Kellie's discharge should be **OVERRULED**.

Plaintiff shall prepare and submit a final judgment consistent with this opinion.

SO ORDERED this 20th day of September 2004.



DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE