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

IN RE:	§	
	§	
ANTHONY G. MOSCHELLA,	§	
Debtor.	§	CASE NO. 03-47690-DML-7
	§	

UNITED STATES TRUSTEE,	§	
Plaintiff,	§	
	§	
vs.	§	ADV. NO. 04-4055
	§	
ANTHONY G. MOSCHELLA,	§	
Defendant.	§	

MEMORANDUM OPINION

The above-styled adversary proceeding came on for trial on June 23, 2004. At that time Anthony Moschella ("Defendant" or "Debtor") testified and the United States Trustee ("Plaintiff" or "UST") introduced his exhibits 1 and 3-10. This adversary proceeding seeks denial of Debtor's discharge pursuant to section 727(a)(4) of the Bankruptcy Code[1] (the "Code") and thus is subject to this court's core jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(b)(2)(J). This memorandum opinion constitutes the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

I. Discussion: Moschella

This case involves omissions and misstatements in the schedules and statement of affairs filed by Debtor pursuant to Code § 521(1) and FED. R. BANKR. P. 1007(b)(1). Plaintiff asserts

1 11 U.S.C. §§ 101 *et seq.*

that Defendant's discharge should be denied by reason of those omissions and misstatements pursuant to Code § 727(a)(4)(A) which states:

> (a) The court shall grant the debtor a discharge unless –
>
> . . .
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case –
>
> (A) made a false oath or account;
>
> . . . .

In order for the court to deny Debtor a discharge pursuant to section 727(a)(4)(A), Plaintiff must show (1) that Debtor made a statement under oath; (2) that the statement was false; (3) that Debtor knew the statement was false; (4) that the debtor made the statement with fraudulent intent; and (5) that the statement related materially to the bankruptcy case. *Cadle Company v. Mitchell*, No. 03-10885, Slip Op. at p. 2 (5th Cir. 2004);[2] *Sholdra v. Chilmark Fin., LLP (In re Sholdra)*, 249 F.3d 380, 382 (5th Cir. 2001); *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992).

Of these five elements, there is no dispute that the statements complained of by the UST in the case at bar satisfy three. As statements made in the schedules and statement of affairs filed in his bankruptcy case, they were made under oath. Defendant does not dispute that the statements at issue were false or that he knew of their falsity. Defendant argues only that his incorrect statements were not material to the case and he made them without fraudulent intent.

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[2] The court recognizes that the Court of Appeals issued *Mitchell* without according it precedential value. However, the District Court, in its opinion in Brown v. Chesnut (In re Chesnut), No. 4:04-CV-342-A, (Slip Op. at p. 8) has directed this court to *Mitchell* for guidance. This court thus believes that for it *Mitchell* constitutes binding authority. *Mitchell* appears to establish at least a presumption that disposes of most cases like that at bar. The court, as discussed below, expects all chapter 7 trustees and the UST to adopt and comply with *Mitchell* in cases assigned to the undersigned.

The UST contends the omissions and incorrect statements were material to the case and made with fraudulent intent. The UST complains of the omission from the Debtor's schedules certain real estate, a GMC Yukon and a Ford truck (the lien on which Debtor reaffirmed) and equity interests in at least eight corporations. Among misstatements in the statement of affairs were his income (question #1) and his corporate equity interests and positions as officer and director in at least eight corporations (question #18(a)[3]).

There can be no question about the materiality of these omissions. The judicial standard of materiality is an easy one to meet. As the Court of Appeals for the Fifth Circuit stated in *Beaubouef* (966 F.2d at 178), quoting COLLIER ON BANKRUPTCY:

> The subject matter of a false oath is 'material' . . . if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.

Value is immaterial. Though a failure to give proper value to an item may itself constitute a false statement, and the Debtor's views of value are to be scrutinized critically (*Mitchell*, slip. op. at 3), that the omission was of an asset without value does not make the omission immaterial. As the court in *Beaubouef* stated (966 F. 2d at 179) the failure to disclose a relationship to a defunct corporation "constituted an omission of information regarding the

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3 Question #18(a) on the statement of affairs reads, in pertinent part:

> If the debtor is an individual, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employeed professional within the **six years** immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the **six years** immediately preceeding the commencement of this case.

(Emphasis in original).

debtor's business dealings which could have led to the discovery of assets and/or the existence and disposition of his property."

In the instant case, Defendant relies on the fact that his corporations were defunct and he had legal title only to real or personal property not listed in his schedules. He testified that the property was purchased in his name for the ownership of others. The fact that the corporations were shut down – bankrupt, in fact – clearly does not make Moschella's omission of their stock from his schedules and failure to disclose his relationship to them immaterial. From Moschella's testimony it was obvious that an understanding of his prepetition business activities required an understanding of the corporations. Indeed, his own bankruptcy filing was a direct consequence of his dealings with and through the corporations. Omitting any mention of them[4] unquestionably meets the materiality test of Code § 727(a)(4)(A).

Failure to list anywhere the vehicles and real estate held in his name but owned by others is also material (this property ought at least to have been listed at question #14, statement of affairs, "Property held for another person"). It is not up to a debtor to make for the trustee the decision of whether to pursue claims against such items and attempt to recover them for the estate.

Put simply, "materiality" is not truly a question of fact. If the trustee or a creditor might reasonably consider a misstatement or omission material it is, by definition, "material." The finder of fact need go no further than that. In the case before it, the court finds that Debtor incorrectly responded to five items on his schedules and statement of affairs (misstatement of

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4 Moreover, disclosure in one place in the schedules does not excuse a failure to disclose the same information in another place. *Mitchell,* Slip Op. at 4.

income, failure to disclose corporate stock in two places, failure to disclose legal title to real estate and one vehicle (the Ford, the UST did not present evidence respecting the GMC Yukon)). The court finds that these omissions are also material.

The next question the court must address is whether Debtor's omissions and misstatements under oath were intentionally fraudulent. A Debtor's failure to properly complete his schedules and statement of affairs is intentionally fraudulent if his conduct amounts to reckless disregard for the truth. *Sholdra*, 249 F.3d at 383; *Beaubouef*, 966 F.2d at 178; *Oldendorf v. Buckman*, 173 B.R. 99, 105 (E.D. La. 1994) (failure to clear up more than one falsehood when filing amended schedules may constitute reckless indifference to the truth and amount to intent to deceive); *Economy Brick Sales, Inc. v. Gonday (In re Gonday)*, 27 B.R. 428, 432 (Bankr. M.D. La. 1983) (pattern of reckless and cavalier disregard for the truth serious enough to supply the necessary fraudulent intent required by Section 727(a)(4)(A)). In *Mitchell*, the Court of Appeals held that numerous errors in completing the schedules and statement of affairs explained only by carelessness constitute a reckless disregard for the truth. Slip Op. pp. 3-4. The court will therefore presume that a debtor must be denied a discharge under Code § 727(a)(4)(A) if he makes numerous careless, material mistakes[5] in completing his schedules and statement of affairs for which he can offer no satisfactory explanation.[6]

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5 The court recognizes Defendant claims several of his mistakes were due to lack of knowledge. To the extent Defendant's testimony on that score was credible, given the clear requirements of the schedules and statements of affairs, the approximately 16 careless omissions concerning corporations are enough "careless" errors to satisfy Code § 727(a)(4)(A), as interpreted in *Mitchell*.

6 Though the Court of Appeals in *Mitchell* left open the door to cure schedules through amendment, cure after the commencement of an adversary discharge proceeding would not be effective. In the case at bar Debtor made no corrections prior to the commencement of this adversary proceeding. The court need not now address what other showing might excuse many careless errors.

The first question left to the court, then is numerosity. In the *Mitchell* case, the Court of Appeals concluded a total of six mistakes in a set of schedules and a statement of affairs was "numerous." The court therefore concludes that a total six or more careless, material mistakes made in an ordinary set of schedules and statement of affairs filed by an individual debtor presumptively satisfies the numerosity requirement of *Mitchell*. Debtor's schedules and statement of affairs are consistent in length and complexity with what would be expected in an ordinary consumer case. Accordingly, Defendant's careless, material errors were sufficient in number to constitute reckless disregard for the truth for purposes of finding fraudulent intent under Code § 727(a)(4)(A).

The one remaining matter the court must address to dispose of this adversary is whether Defendant has shown reason for the court to ignore the presumption that the numerous careless, material errors in his schedules and statement of affairs constitute a bar to his discharge. The only excuses Defendant offered were the stress he was undergoing when he completed his filings and his medical treatment for depression. The court does not find in *Mitchell* or other controlling authority any suggestion that this Debtor's ills excuse proper completion of his schedules and statement of affairs.

Stress and depression – and frequently time pressure – accompany the commencement of any bankruptcy case. Were the court to consider evidence such as that presented by Defendant to be sufficient to overcome the presumption it finds in *Mitchell* it would be tantamount to frustrating the intent of the Court of Appeals and ignoring the directions of the District Court.

For these reasons, the court holds that Debtor, Defendant, must be denied his discharge pursuant to sections 727(a)(4)(A). Plaintiff is directed to prepare and submit a judgment in accordance with this memorandum opinion.

II. Discussion: Individual Chapter 7 Cases in General

It is this court's experience, gained both through service on the bench and 29 years of private practice, that most sets of schedules and statements of affairs contain errors which can be explained only by carelessness. The court, however, does not believe it appropriate that only the debtors in the *Mitchell* case – who were otherwise indistinguishable from the typical consumer debtor in their conduct – should be denied a discharge on the basis of numerous careless errors in their schedules and statements of affairs. Rather, all individual chapter 7 debtors should receive or be denied a discharge according to the same set of rules. Yet, only two challenges to discharge under section 727(a)(4)(A) have been pursued during the tenure of the undersigned. The court would be pleased to learn, but doubts, that this paucity of discharge challenges is because most debtors are properly completing their schedules and statements of affairs. The court fears, instead, that discharge complaints are simply not being filed in many cases where they should be.

In *Mitchell,* a creditor, the Cadle Company, stepped forward to challenge the debtors' discharge. The court cannot count on creditors to assume this burden in every case. Further, whether or not a debtor receives a discharge should not depend from case-to-case upon the presence of a creditor willing to act. If such a volunteer is a prerequisite to proper policing of individual debtor cases, it will encourage a vigilante approach to justice in the bankruptcy court

and, potentially, use of the threat of a complaint under Code § 727(a)(4)(A) to force debtors to acquiesce to determination that a single creditor's debt is nondischargeable.

Section 704(6) of the Code provides that the chapter 7 "trustee shall – . . . (6) if advisable, oppose the discharge of the debtor." The court has found no case that explains when opposing a discharge is "advisable." The court concludes that opposing a discharge is "advisable" at least when (1) the estate can afford to pursue a complaint under section 727, and (2) the trustee is likely to be successful.

Obviously this does not mean that a debtor whose estate is impecunious should be safe from objections to his or her discharge. Where the debtor's estate includes no assets to fund litigation by the trustee, there is all the more reason to ensure that the debtor's schedules have been properly and accurately prepared. A discharge ought not to be a reward for denuding oneself of property that might otherwise provide a trustee with the wherewithal to investigate and pursue causes of action.

Happily, as was the case with the Debtor in the case at bar, the UST is available to challenge a debtor's discharge when it is uneconomic for the chapter 7 trustee to do so. If the UST and the trustee perform their duties, few debtors will be able to obtain a discharge in spite of a failure to accurately complete schedules and statements of affairs. Even when a creditor initiates an action under section 727, the trustee and the UST should take a position in the suit. The court, of necessity, must rely heavily on the trustee and the UST, both neutral parties, in assessing a debtor's conduct in his or her bankruptcy case.[7]

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7 In *Mitchell*, in fact, the chapter 7 trustee testified in support of debtors and their discharge. No doubt the trustee did not properly appreciate the seriousness of mistakes in the debtors' schedules and statement of

The court expects trustees and the UST hereafter to be much more active in policing the issuance of discharges. Though other portions of section 727 have been applied with a lenience that favors granting of a discharge,[8] at least with respect to section 727(a)(4)(A), consistency demands a more rigorous approach in the future. In assessing a trustee's entitlement to compensation, the court will consequently require assurance that the trustee has performed his or her duties under section 704(6). The court also expects the UST to be actively involved in no-asset personal bankruptcy cases to ensure that discharges are not improperly awarded with undue liberality. Should a chapter 7 trustee perceive the need for action under Code § 727 in a no-asset case, in order to comply with section 704(6) that trustee must, at a minimum, notify the UST of the situation.

The court also notes that the language of section 727(a)(4)(A) is virtually the same as 18 U.S.C. § 152(2).[9] Section 3057 of title 18 requires

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affairs.

8 Rosen v. Bezner (*In re* Rosen), 996 F.2d 1527, 1534 (3d Cir. 1993) ("§ 727 is to be construed liberally in favor of the debtor and that a total bar to discharge is an extreme penalty."); Melancon v Jones (*In re* Jones), 292 B.R. 555, 559 (Bankr. E.D. Tex. 2003) ("Moreover, 11 U.S.C. § 727 is to be construed liberally in favor of the debtor and strictly against the creditor in furtherance of the 'fresh start' policy."). *See also* 7 COLLIER ON BANKRUPTCY ¶727.02[3][a] (15th ed. rev. 2003) ("Grounds for discharge should be liberally construed in favor of the debtor.").

9 18 U.S.C. § 152(2) states:

> A person who –
>
> > (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
> > . . .
> > shall be fined under this title, imprisoned or both.

The court notes this provision applies to all cases under the Code.

> "[a]ny judge, receiver, or trustee having reasonable grounds for believing that [a bankruptcy crime] has been committed, or that an investigation should be had in connection therewith . . . shall report to the appropriate United States attorney all the facts and circumstances of the case . . . ."

Although the Fifth Circuit Court of Appeals has not applied 18 U.S.C. § 152(2) as it did section 727(a)(4)(A) in *Mitchell*,[10] the language of 18 U.S.C. § 3057 suggests that cases of inaccurate and incomplete schedules require investigation. The court expects that in the future chapter 7 trustees and the UST's will bring potentially guilty debtors to the attention of the United States attorney.

III. Conclusion

It has often been opined that a bankruptcy discharge is a privilege, not a right. *United States v. Johnston*, 267 B.R. 717, 722-23 (N.D. Tex. 2001) ("The debtor is required 'to fully disclose his property and his financial affairs, since a discharge is a privilege granted the honest debtor, and is not a right accorded all bankrupts.' ") (quoting *In re Dias*, 95 B.R. 419, 421 (Bankr. N.D. Tex. 1988)); *Union Planters Bank, N.A. v. Connors*, 283 F.3d 896, 901 (7th Cir. 2002) ("Although the denial of discharge in bankruptcy should be construed strictly against the creditor and liberally in favor of the debtor, such discharge is not a right, but a privilege.") (internal citations omitted); *Dubrowsky v. Estate of Perlbinder (In re Dubrowsky)*, 244 B.R. 560, 572 (E.D.N.Y. 2000) ("A discharge under section 727 is a privilege, not a right, and may only be granted to the honest debtor."). If past practice has been to take lightly the burden of preparing schedules and statement of affairs, that practice must now change. While this court may retain

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10 *See* Friendly Finance Discount Corp. v. Humphries (*In re* Humphries), 469 F.2d 643, 644 (5th Cir. 1972) (omissions were a result of oversight and misunderstandings; no showing that acts were done with knowledge that they were untrue; no showing of actual intent to hinder, delay or defraud creditors).

doubts about the practicality of a low tolerance for mistakes by debtors in schedules and statement of affairs, the court understands that its latitude in this area is very narrow. The court can, however, take steps to ensure more equal application of the law. Implementing the actions discussed in part II of this opinion will help achieve that goal.

Signed this the 9th day of August 2004.

DENNIS MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE