UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
WAYNE CHARLES TOMASEK, JR.	§	**Case No. 02-38373-HDH-7**
	§	
Debtor	§	

PAUL AND ALENE DAVIS	§	
	§	
Plaintiffs	§	
	§	
vs.	§	**Adversary No. 02-3729**
	§	
WAYNE CHARLES TOMASEK, JR.	§	
	§	
Defendant	§	

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Findings of Fact

1. Paul and Alene Davis own CMAP, Inc. ("CMAP").

2. The Davises, through CMAP, operated a Taylor Rental Center franchise, a business that rents light and heavy construction, industrial and maintenance equipment, as well as party supplies, to the general public.

3. On or about January 1, 1995, CMAP entered into a Purchase and Sale Agreement with Charles Wayne Tomasek, Jr. ("Tomasek") and Donald Wayne Ray ("Ray"), pursuant to which the business would be sold to Tomasek and Ray.

4. In order to purchase the Taylor Rental Center business, Tomasek and Ray signed a 10-year Note dated January 1, 1995 (the "Purchase Note") for Three Hundred Thousand Dollars ($300,000.00) to CMAP, Inc., and a Security Agreement dated January 1, 1995 (the "Security Agreement") covering all assets of Taylor Rental Center and naming CMAP as the secured party. Tomasek and Ray also signed a Lease (the "Lease") for use of the building and land where the business was located. The lessors were Paul and Alene Davis.

5. In February 1995, Tomasek and Ray formed Tomray Enterprises, Inc., a Texas corporation ("Tomray") to operate the Taylor Rental Center business.

6. The parties dispute whether the sale actually closed on January 1, 1995, or on April 1, 1995.

7. Tomasek, in signing the Note, the Security Agreement, and the Lease, claims that he believed that he was acting on behalf of the yet to be formed corporate entity, Tomray, with the knowledge and consent of CMAP, Inc. and the Davises.

8. In connection with the sale of the business, on January 24, 1995, CMAP filed a financing statement in Dallas County, Texas, evidencing its security interest in "all assets + inventory of Taylor Rental Center."

9. The financing statement expired five years later in 2000 and was not renewed.

10. Tomray owned and operated the Taylor Rental Center from April 1, 1995, until March 28, 2002. Tomray made payments from its corporate checking account to CMAP, Inc., for its obligations under the Note and to Paul and Alene Davis for its obligations under the Lease.

11. Over the course of the seven years that Tomray operated the Taylor Rental Center, Tomray suffered losses of machinery and equipment that are common to the property rental business.

Such losses included normal wear and tear, breakdown, and physical damage to equipment. At times, renters did not return various pieces of inventory. At other times, Tomray sold equipment that had significantly depreciated in value or was no longer useful to rent.

12. During that seven-year period, the building also suffered normal wear and tear. Tomray made some repairs to the building during that period.

13. The Taylor Rental Center operated successfully from April 1, 1995, through Fall 2001. After the terrorist attacks on the World Trade Center, the market for rental equipment and rental party supplies was drastically affected for the worse. The business suffered from then on as sales were markedly below historical amounts.

14. Tomasek's mother's Trust (the "Trust") loaned $65,000 to Tomray. The proceeds of the loan were used to pay debts of Tomray, including past due amounts owed under the Note and the Lease.

15. In December 2001, Tomray borrowed more money from Security Bank, the proceeds of which were used to consolidate previous debts of Chuck Tomasek, Wayne Ray, and Tomray, as well as to provide additional working capital to Tomray. Tomray used those funds, in part, to pay CMAP and the Davises past due amounts on the Note and on the Lease.

16. Because of the failing economy, Tomray continued to fall behind in its obligations to CMAP on the Note and to the Davises on the Lease of the property. Tomasek, on behalf of Tomray, and the Davises, on behalf of CMAP, began discussions for the orderly return of Taylor Rental Center to CMAP in late January or early February of 2002.

17. These discussions included meetings with Security Bank, meetings between the parties directly, and correspondence between the attorneys for the parties regarding mutually

satisfactory terms for the return of the business.

18. On or about March 28, 2002, Paul Davis came to the business premises of Tomray, ordered Tomasek to leave, and thereafter changed the locks on the business. Davis took possession of the collateral for the Purchase Note that was present on the property. Davis also took possession of some property of Tomray that was not secured by the Security Agreement, including non-business personal property belonging to Tomasek.

19. At the time of the lockout, virtually all of Tomray's corporate books were in the offices of Taylor Rental Center, with the exception of some accounting records. Those accounting records were in the possession of Tomray's accountant, Carmella Bingham, who is the daughter of the plaintiffs. The majority of Tomray's accounting records were in a computer system that had been seized by the Davises or CMAP on March 28, 2002.

20. On April 22, 2002, Tomray filed a Chapter 7 petition. The Trustee in that case filed his no asset report on August 27, 2002. That case was closed on January 10, 2003.

21. On September 29, 2002, Tomasek filed a Chapter 7 petition. With his petition, Tomasek also filed schedules and statements of financial affairs (the "Original Schedules"). The following items on the Original Schedules are inaccurate:

    a. On Schedule B, number 2, the name and account number for Tomasek's checking account were not shown. The fact that a checking account existed and that its balance was unknown was shown.

    b. On Schedule B, number 5, Tomasek's collection of "a few" DVDs, CDs, and schoolbooks were not listed.

    c. On Schedule B, number 7, Tomasek's watch was not listed.

d. On Schedule B, number 8, Tomasek's 35mm camera and a digital camera were not listed.

e. On Schedule B, number 19, Tomasek's interest in his mother's trust was not listed.

f. On Schedule F, Paul and Alene Davis were not listed as creditors for unpaid rents for the Taylor Rental Center location.

g. On Schedule F, Kubota was not listed as a creditor.

h. On Schedule G, the fact of an apartment rental contract was listed, but no name or address was given for the landlord.

i. On Schedule G, the fact that the debtor was co-signer on a lease for Zion Church was listed, but the name and address of the co-signer was not listed.

j. On Schedule G, the Lease signed by Tomasek for the Taylor Rental Center location was not listed.

k. On Schedule H, Tomray was not listed as a co-debtor for the corporate debts of Tomray listed on Schedules D, E, and F. But, Schedules D, E, and F each disclose for each creditor that the debt is corporate debt of Tomray.

l. On the Statement of Financial Affairs, number 9, no payment to Tomasek's lawyers was shown.

22. Tomasek had a checking account. He lived in an apartment for which the lease had expired and he was occupying on a month-to-month basis. He was not behind on his monthly rent of $640 at the time he filed bankruptcy. Tomasek's parents had placed the deposit on the apartment for him.

23. Tomasek testified that in assessing his household contents and his answers to items 4 and 5

on Schedule B, he had lumped all of his household contents together at one value of $1,000.

24. Tomasek testified that a friend had his 35mm camera and it had been in the friend's possession for a year prior to the filing of the schedules. Tomasek testified that he had forgotten about the camera when he completed his schedules.

25. Tomasek testified that he had a digital camera and that it was at the Taylor Rental Location, having been seized by the Davises in March 2002. He testified that he assumed that since the property had been taken from him that he did not need to list it. Tomasek did disclose in Item 5 of the Statement of Financial Affairs that the Davises/CMAP had repossessed all of his property.

26. At the § 341 meeting of creditors, Tomasek was asked about the Trust by counsel for the Davises. At that point he realized that he may have an interest in the Trust, and disclosed that fact to the Trustee during the § 341 meeting, although he was unsure of what kind of interest. Subsequently, Tomasek learned from his father that his father is the primary beneficiary of the Trust and that Tomasek will only have an interest in the Trust if his father predeceases him. On December 27, 2002, Tomasek amended his schedules to reflect his contingent interest in the Trust. Tomasek claims he has never had possession of a copy of the Trust document, nor had he ever seen it or had access to it until it was furnished to him as one of Plaintiff's exhibits.

27. CMAP, through its attorney, filed a Proof of Claim on August 7, 2002, in the bankruptcy of Tomray. At that time, CMAP and the Davises were represented by counsel and had the advice of an accountant. The Proof of Claim asserts that CMAP is entitled to recover from Tomray the following items: unpaid rent on the Taylor Rental Center location; damages to

the building pursuant to the Lease; loss and damage to collateral under the security agreement; a balance owed to Security Bank; moneys advanced to pay creditors of Taylor Rental Center for debts incurred prior to March 28, 2002, and attorney's fees and accounting fees.

28. CMAP, again through its attorney, filed a Proof of Claim on October 25, 2002 in the bankruptcy of Tomasek. The Proof of Claim attaches an exhibit identical to the exhibit attached to CMAP's Proof of Claim filed in the Tomray case. The Proof of Claim in the Tomasek case asserts that all such amounts are owed by Tomasek to CMAP.

29. The Davises brought this action in their own names. CMAP is not a plaintiff.

30. There is no evidence that Tomasek failed to provide financial records from which his true financial condition could be determined.

31. There is no evidence that Tomasek personally sold any property belonging to Tomray or CMAP.

32. There is no evidence that Tomasek personally damaged or converted any property belonging to Tomray or CMAP.

33. There is no evidence that Tomasek had a duty to account or, if he had such a duty, failed to account for the proceeds from the sale of any equipment of Taylor Rental Center.

34. The building and equipment are in poor condition. However, there is no evidence that Tomasek personally damaged the building or the real property owed by the Davises.

35. Any conclusion of law may also be deemed a finding of fact.

Conclusions of Law

1. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157 and 1334 and 11

U.S.C. §§ 523 and 727.

Standing

2. Any debts owed by Tomasek under the Note and Security Agreement appear to be owed to CMAP at the time this case was filed. CMAP's claims against Tomasek were purportedly assigned to the Davises after the bar date for filing an action to determine discharge and dischargeability. Therefore, the Davises standing to assert the non-dischargeability of any debt arising under the Security Agreement is somewhat questionable. However, the Davises claim to be a creditor in various other respects, including as a Lessor, and will, for purposes of these findings and conclusions, be treated as a creditor.

Dischargeability

3. The Davises have the burden of proof under Bankruptcy Code § 523 to establish by a preponderance of the evidence that a debt should be declared non-dischargeable.

4. The Davises have failed to carry their burden under § 523.

5. Section 523(a)(2) excepts from discharge debt obtained by false pretenses. The Davises have failed to show that Tomasek obtained debt from them by false pretenses. Counsel for the Davises conceded that no proof was presented on this issue in Plaintiff's case.

6. Section 523(a)(4) excepts from discharge any debt for fraud or defalcation while the debtor acted in a fiduciary capacity, embezzlement, or larceny. The Davises conceded that they have no claim for fraud, embezzlement, or larceny. Under section 523(a)(4), a claim for defalcation can only arise if the debtor has a fiduciary relationship to the creditor. No evidence was introduced to demonstrate a fiduciary relationship between Tomasek and the Davises. Under Texas law, a debtor-creditor relationship is not a fiduciary relationship.

Accordingly, even if Tomasek was personally indebted to the Davises, no fiduciary relationship existed arising out that indebtedness.

7. 11 U.S.C. § 523(a)(6) excepts from discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity." Photographs and other testimony were introduced into evidence showing serious damage to the building and improvements where Tomray operated the Taylor Rental Center, and a failure to take care of the premises. Mr. Tomasek testified that he did not personally cause any of the alleged damage complained of by the Plaintiffs. Tomasek testified that damage did occur during the ordinary daily use of the facility for the business. Tomasek testified that he had made numerous repairs over the years to the property, but that the business ran out of money at the end to pay for additional repairs.

8. Moreover, the Davises testified that they had no knowledge of any damage that Mr. Tomasek personally caused. The Plaintiffs contend, however, that alleged damage to the Taylor Rental Center should be excepted from discharge to the extent that Tomray, Inc.'s employees over whom Mr. Tomasek presumably had control may have caused the damage. The Davises assert that a debt for damage to the building can be held non-dischargeable if the actions of the employees of Tomray can be imputed to Tomasek personally. The Plaintiff's reliance on section 523(a)(6) is misplaced. When presented with this issue, the courts have overwhelmingly held that section 523(a)(6) specifically excepts from discharge only damage caused *by the debtor,* and contains no reservation for "vicarious liability".

> Under 523(a)(6), it is the debtor who must act in causing the willful and malicious injury to another entity. It has been universally held that a person's willful and malicious action cannot be imputed to another person or entity for the purpose of holding that debt non-dischargeable under 523(a)(6).

In re Bucak, 278 B.R. 488, 496, fn. 7 (Bankr. W.D. Tenn. 2002). See also *In re Miller*, 196 B.R. 334 (Bankr. E.D. La. 1996); *In re Maltais*, 202 B.R. 807 (Bankr. D. Mass. 1996); *In re Sullivan*, 198 B.R. 417 (Bankr. D. Mass. 1996); *In re Graham,* 191 B.R. 162 (Bankr.W.D.Mo. 1995); *In re Albano,* 143 B.R. 323 (Bankr. D. Conn. 1992); *In re Calhoun,* 131 B.R. 757 (Bankr. D.D.C. 1991); *In re Figge,* 94, B.R. 654 (Bankr. C.D. Cal. 1988); *In re Whitacre*, 93 B.R. 584 (Bankr. N.D. Ohio 1988); *In re Eggers*, 51 B.R. 452 (Bankr. E.D. Tenn. 1985); *In re Horne*, 46 B.R. 814 (Bankr. N.D. Ga. 1985); *In re Austin*, 36 B.R. 306 (Bankr. M.D. Tenn. 1984).

9. Furthermore, the Davises introduced no testimony or evidence that any deliberate harm was done to the building by any employee of Tomray or that such damage was done with Tomasek's knowledge or consent.

10. Photographs and testimony were also introduced showing substantial damage to some of the machinery and equipment that were assets of Tomray. Testimony was also introduced to the effect that machinery and equipment that was secured pursuant to the security agreement was not present at the Taylor Rental Center on March 28, 2002, when CMAP repossessed its collateral. Paul Davis admitted, though, that machinery and equipment were routinely damaged in a rental business and that customers frequently failed to return items in good repair. Sometimes items were stolen. Tomasek testified as well about the ongoing costs of maintaining, repairing, and replacing equipment. The tax returns of Tomray demonstrate that substantial sums of money were spent over the years acquiring replacement property for the business. No evidence was introduced to show that Tomasek personally damaged, lost, or stole any of CMAP's collateral. Under these circumstances, the Court finds that the Davises

have not met their burden of proving that Tomasek should be denied a discharge of any indebtedness for lost or damaged equipment.

Discharge

11. Section 727(a)(2) allows the court to deny discharge to a debtor who, with intent to hinder, delay, or defraud a creditor has transferred removed, destroyed, mutilated, or concealed, property of the Debtor within one year of the filing of the petition. The Davises have failed to show that Tomasek transferred, removed, destroyed, mutilated or concealed any of his personal property at any time. Testimony in this regard seemed to focus on the property of Tomray, rather than property belonging to Tomasek personally. As discussed above with regard to the section 523(a)(6) claim, the Davises have failed to show that Tomasek personally took any action with intent to hinder, delay or defraud any creditor with respect to any of his individual property. The Davises have failed to show that any of Tomasek's property was transferred, removed, destroyed, mutilated or concealed within one year of the filing of his personal bankruptcy case. To the contrary, the evidence shows only that Tomray's property was damaged or lost during its intended use. There is no evidence that Tomasek caused the transfer, removal, destruction, mutilation, or concealment of any property of Tomray, except within the ordinary course of Tomray's business. There was no evidence that Tomasek operated the business with intent to hinder, delay, or defraud any of his creditors.

12. Section 727(a)(3) allows the court to deny discharge to a debtor who 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. The Davises have failed to show that Tomasek has concealed or failed to keep or preserve recorded information regarding his personal affairs from which his financial condition or business transactions might be ascertained. The Davises argue that the fact that Tomray's schedules list so many items as "unknown" in value or quantity establishes a failure to keep adequate information. But, the Davises and their daughter have been in possession of all of Tomasek's computerized business records for Tomray and some of his personal records because they were stored in the office of Taylor Rental Center, or were given to the daughter for accounting purposes. It was not until two months before the conclusion of the trial in this matter that the Davises turned over some of the business records of Tomray they had in their possession.

13. Finally, some courts have held that a denial of discharge under section 727(a)(3) is limited to business records of the debtor, not business records of a corporation controlled by the debtor. *In re Moran*, 120 B.R. 379 (Bankr. W.D. Va. 1990). No evidence was offered at trial that Tomasek kept inadequate personal records. Further, any inadequacies in his personal records were justified under the circumstances because the Davises had possession of substantially all of his current business records and had not turned them over to him.

14. Section 727(a)(4) allows the court to deny a discharge to a debtor who knowingly and fraudulently, in or in connection with the case, made a false oath. The question in this case is whether the inadequacies in Tomasek's personal schedules or in his testimony at his Section 341 meeting of creditors rise to the level of a false oath under this section.

15. The Davises also assert that Tomasek should be denied a discharge under 724(a)(4) in his

personal case because he made a false oath in connection with the schedules of Tomray in the corporation's chapter 7 case. Section 727(a)(7) provides that the debtor can be denied a discharge if he committed a false oath on or within one year before the date of the filing of the petition, or during the case, in connection with another case concerning an insider. The Davises, however, have never pled that Tomasek violated Section 727(a)(7). Furthermore, there was no evidence that Tomasek made a false oath in the Tomray case.

16. The vast majority of the Davises' complaints concerning the Tomray schedules arise directly out of the fact that they were in possession of Tomray's business records and refused to turn them over or give access to Tomasek to complete more accurate schedules.

17. Under section 727(a)(4), the Davises have the burden of proving that (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement was material to the bankruptcy case. *In re Sholdra*, 249 F.3d 380, 382 (5th Cir. 2001); *In re Beaubouef*, 966 F.2d 174, 178 (5th Cir. 1992).

18. Tomasek does not deny that he made material, false statements under oath. But, there was no evidence that Tomasek made any such statements with fraudulent intent. Instead, the Davises argue that Tomasek made the statements with reckless indifference to the truth. See, e.g., *In re Sholdra* at 382; *In re Mitchell*, No. 4:03-CV-281-A, U.S.D.C. for the Northern District of Texas, Fort Worth Division, Slip Opinion at 5 (on appeal to the U.S. 5th Circuit Court of Appeals). It is unclear whether "reckless indifference" is the standard, given the clear language of the statute.

19. The Davises have alleged numerous falsehoods in Tomasek's personal schedules. The court is convinced that there are some inaccurate answers in Tomasek's schedules and Tomasek concedes as much. Whether, though, the number and materiality of the falsehoods constitute reckless disregard for the truth is another question. The fact that a particular falsity pertains to worthless assets or is otherwise trivial might be evidence that there was no actual fraudulent intent. *In re Bernard*, 99 B.R. 563 (Bankr. S.D.N.Y. 1989).

20. The court finds the following regarding allegations of falsehood and false oath by the debtor:

a. Original Schedule B, item 1: The schedule states that the Debtor had no cash on hand. While it is unusual for a debtor to have absolutely zero cash, there was no testimony that he, in fact had any cash. Plaintiff's counsel asked Tomasek on the stand whether he had any cash in his wallet at the time of the trial and Tomasek answered "no." Tomasek was unemployed at the time and the court finds it likely that Tomasek had expended all of his cash prior to filing his case. Therefore, the Davises have failed to establish that this item was answered falsely.

b. Original Schedule B, item 2: The schedule states that Tomasek had a checking account and states that the amount was unknown. Tomasek testified that he did not know how much was in his checking account at the time he filed his case because it was in a constant state of flux between barely above zero and overdrawn. Neither the Davises nor Tomasek introduced any evidence of the value of the checking account on the date of the original schedules. The Davises have failed to carry their burden of proof to establish that the value "unknown" was a falsity. But, Tomasek also failed to list the name of the banking institution and account number. The instructions to

the schedule require the debtor to list, for any property being held by another person, the name and address of the holder of the property. Tomasek must have known the name and address of his bank account and the failure to list it is an omission.

c. Original Schedule B, item 3: The Davises allege that Tomasek should have listed a deposit with his apartment landlord. Tomasek testified that his parents put up the deposit for his landlord and that the money belonged to them, not him. The Davises did not introduce any evidence to the contrary. Consequently, the court finds that item 3 does not contain a misstatement.

d. Original Schedule B, item 4. Tomasek listed "furniture, household goods" with a value of $1,000.00. The Davises complain that Tomasek should have listed his household contents in more detail. In light of the fact that all of the property was claimed as exempt and there was no evidence that Tomasek's personal household goods and furniture were worth more than $1,000, the court concludes that no additional detail was required in response to this item. Therefore, the Davises have not carried their burden to prove that this item was false.

e. Original Schedule B, item 5. Tomasek listed "none" as his answer while he actually owned a small collection of DVDs, CDs, and books. Tomasek admitted that he had such items and, therefore, Tomasek's answer to this item was not accurate. By itself, a false answer to this item does not constitute a false oath within the meaning of 727(a)(4) because Tomasek did not have the requisite level of fraudulent intent. Tomasek testified that in preparing his answer to item 4, household goods, he had lumped his small collection of DVDs, CDs, and books in with those items. If he had

segregated out from household goods and furnishings his DVDs, CDs, and books, the value of his household goods would have declined by the amount that his answer to this item increased. There was, again, no testimony that established that the value of Tomasek's household goods and furnishings, including his DVDs, CDs, and books, exceeded the $1,000 asserted in answer to item 4. Nevertheless, item 5 clearly requires that DVD's, CDs, and books be listed under this item. The Court finds that this item contains a false answer.

f. Original Schedule B, item 6: Tomasek answered "clothing" with a value of $100. The Davises introduced no evidence to show that Tomasek had any clothing with a value greater than $100. Instead, the Davises maintain that Tomasek should have listed his clothing in more detail. The court disagrees and finds that no false statement was made in response to this item.

g. Original Schedule B, item 7: Tomasek answered "none" and his testimony established that he had no rings, no necklaces, and no other jewelry except a watch he had purchased at Wal-Mart. He also testified that he considered his watch to be part of his clothing. The Davises argue that Tomasek should have listed his watch, even if it was worth little. The Court disagrees and holds that a low value watch may be considered as clothing.

h. Original Schedule B, item 8. Tomasek answered this item "none." On the witness stand, Tomasek admitted that he had a fish tank, a 35 mm camera, and a digital camera. Tomasek testified that his fish tank was included in household goods and furnishings and the court finds no reason to disagree with that characterization of the

fish tank. Tomasek testified that the 35 mm camera had been loaned to a friend about a year before he filed bankruptcy and had not been returned by the friend. Tomasek testified that he had just forgotten about it in light of its not being around his house. The digital camera, Tomasek testified, was at the Taylor Rental Center location on the date that the Davises had taken over the store. It had not been returned to him in the following months and was not in his possession at the time he filed bankruptcy. Tomasek testified that he did not think he would get it back and he never has gotten it back from the Davises. Nevertheless, Tomasek should have listed his cameras. This item contains a false statement.

i. Original Schedule B, Item 12: Tomasek listed his stock in Tomray and the "Assets of Taylor Rental Center, ownership of assets in dispute," both with unknown values. The court finds that this listing fairly describes Tomasek's assets, given the lack of records and confusion about which entity owned the business.

j. Original Schedule B, Item 15: The Davises assert that Tomasek should have listed an account receivable from Tomray here. But, Tomasek listed back wages and expenses owed by Tomray under item 17. Item 15 is not false.

k. Original Schedule B, Item 17. The Davises assert that Tomasek should have listed a value here instead of "unknown." The schedules require the Debtor to list the "market value" of the Debtor's interest in the property. Given the fact that Tomray had filed Chapter 7 and that the trustee in that case had filed his no asset report before Tomasek filed his personal Chapter 7, a market value of "unknown" is probably correct. The Davises urge that Tomasek should have listed the value as the

same amount shown on Tomray's schedules as owing to Tomasek. But, that would clearly be a false statement of the market value of Tomasek's interest in light of Tomray's bankruptcy. Item 17 is not false.

l. Original Schedule B, item 19. Tomasek did not list his interest in his mother's trust, the Sandra Tomasek Trust. He knew that the trust existed, but he testified that he did not know what his interest in the trust was. At the 341 meeting, Tomasek testified that the Trust was his father's trust. It was clear that he had no idea of what his interest in the trust was or anything about it. He had never seen a copy of the trust instrument and did not have it in his possession. Consequently, Tomasek's failure to list the trust in his schedules is not a false oath. Tomasek's oath in signing the schedules is that they were true, correct, and complete to the best of his knowledge at the time he signed them. The testimony establishes that, even at the 341 meeting, he did not fully understand his interest in the trust. Item 19 is not a false statement.

m. Original Schedule B, item 20. The Davises assert an amount should be listed. The court disagrees. The amount of any such claim had not been established at the time the schedules were filed. Item 20 is not false.

n. Original Schedule B, items 26, 27, and 28. The Davises assert that Tomasek should have listed business assets of Taylor Rental Center here. This is incorrect as Tomray owned all of the assets of Taylor Rental Center. These answers are not false.

o. Schedule D. The Davises assert that Tomray should have listed his apartment landlord as a secured creditor. When an apartment is rented on a month-to-month basis, the rent is prepaid, and no amounts are owed at the time of the filing.

Consequently, the apartment landlord is not a creditor of the estate. The Davises assert that they should have been listed as secured creditors under the Lease. Tomasek testified that he thought that Tomray was the lessee and the correct party with liability. He listed the Davises as creditors on the Tomray schedules. Tomasek did not have a copy of the Lease showing his name on it because the Davises were in possession of his business records. Consequently, this item is not a false oath in the sense that Tomasek believed at the time he filed his schedules that he did not personally owe any money to the Davises. The Davises assert that the Zion Church landlord should have been listed as a secured creditor here. Tomasek testified that no amounts owed the landlord at the time of his filing. This item is not false. The Davises assert that AEL should have been listed here. AEL was the lessor under a lease agreement with Tomray. Tomasek was a guarantor of the lease. No property belonging to Tomasek personally was security for the lease agreement or the guaranty. Tomasek listed AEL as an unsecured creditor. Accordingly, AEL did not belong on Schedule D. Schedule D was correct.

p. Schedule E: The Davises allege that Tomasek should have listed the Texas State Comptroller here. But, Paul Davis also testified that he had to pay all the sales taxes of the business when he took it over. If the Davises satisfied the sales taxes, no amount was due and the Comptroller should not have been listed. Schedule E is correct.

q. Schedule F: Schedule F contains a listing of 57 creditors, their addresses, and amounts owed. The Davises assert that Tomasek's father should have been listed.

But, Tomasek testified that he owed no such debt and no evidence was introduced to contradict that testimony. Similarly, the Davises assert that TXU Electric, Lowes, Bank One, and Bank of America should have been listed, but there was no evidence that Tomasek owed any such debt. Tomasek failed to list his personal guaranty on a debt to Kubota.

r. Schedule G: Tomasek failed to list names and addresses for his apartment landlord and the Zion Church, for which he co-signed the lease. This was a false statement. The Davises also assert that Tomasek should have listed the lease for the Taylor Rental Center. As discussed above, though, Tomasek testified and reported in Tomray's schedules, that he believed that Tomray was the lessee, not him personally.

s. Schedule H: Tomasek failed to list Tomray Enterprises as a co-debtor. However, on schedules D, E, and F, he had listed all of the corporate debts as corporate debts of Tomray. It was false to omit Tomray from Schedule H. Similarly, the Davises were co-obligors with Tomasek on debt to Security Bank and they were not listed on Schedule H. This was incorrect. The other items that the Davises assert to be incorrect on this schedule are not incorrect because the Sandra Tomasek trust was not a co-debtor on any debt and because there was no debt owed to the Zion Church's landlord at the time.

t. On the Statement of Financial Affairs, item 3, the Davises assert that Tomasek should have listed payments to his landlord for rent here. Tomasek testified that he was current on his rent payments, and believed that, since no money was owed to the

landlord and Tomasek could terminate the apartment rental at any time, the landlord is not a "creditor" within the meaning of item 3 on the Statement of Financial Affairs. Tomasek likely is wrong in his legal analysis, but his explanation and testimony refute an allegation of fraudulent intent.

u. Statement of Financial Affairs, Number 7. The Davises assert that Tomasek should have listed contributions to Zion Church. No evidence was introduced to show the amount of any such contributions and Tomasek testified that he had not been able to make any monetary contributions to the church in the year prior to his filing bankruptcy. This item is not false.

v. Statement of Financial Affairs, number 9. Tomasek failed to list payments made to his counsel by him or on his behalf and he was aware of the payments. This item was false, but apparently inadvertent.

w. Statement of Financial Affairs, number 10. The Davises assert that Tomasek should have listed business assets sold within the last year. Tomasek testified that he had sold no such property. If Tomray had sold property, it would be inappropriate to list it here. This item is not false.

x. Statement of Financial Affairs, number 11. The Davises assert that Tomasek should have listed closed financial accounts here. Tomasek testified that he had closed no accounts during the year prior to his filing bankruptcy and no evidence was introduced to the contrary. This item is not false.

y. Statement of Financial Affairs, number 14. The Davises assert that Tomasek should have listed his security deposit as something he "holds" for his parents. He is not

holding that amount, the landlord is. It would have been incorrect for him to list it. The Davises assert that because Tomasek had signature authority over the Tomray bank account that he should have listed the Tomray bank account as property he was holding for another person. Again, this is incorrect in that he was not holding the property, the bank was. And, the bank account was property of Tomray's bankruptcy estate, not property of Tomasek personally or property he was holding for the estate. This item is not false.

z. On the Amended Schedule B, the Davises assert the same errors as on the original Schedule B, except for the trust, which was listed on the amended schedules. The court concludes that the same errors that existed on the original Schedule B also existed on the amended schedule B.

aa. Tomasek's 341 meeting: The Davises assert that Tomasek made a false oath at the 341 meeting. In particular, the Davises allege, the Tomasek swore falsely that he had listed all of his assets and his creditors, that no one held any property for him, and that no one owed him any money. The statement about assets and creditors relates to the truth of the schedules. To the extent that the schedules fail to list all the assets or creditors, and to the extent that Tomasek knew they did not list all of the assets and creditors, this statement is false. The court concludes that the statements are false because of the errors discussed above on Schedules B and F. With respect to the other allegedly false statements, Tomasek clarified them under questioning from his counsel at the 341 meeting and identified that the Davises were holding property for him and that he had claims against various parties. When a statement is clarified or

corrected contemporaneously with the allegedly false statement, the false statement may be cured.

21. After reviewing all of the Davises claims, the court concludes that Tomasek made the following false statements on his schedules:

a. Original Schedule B, Item 2, failing to list the name and address of his bank

b. Original Schedule B, Item 5, failing to list his DVDs, CDs, and books

c. Original Schedule B, item 8, failing to list his 35 mm camera and his digital camera and their value

d. Original Schedule B, item 19, failing to list his interest in his mother's trust.

e. Original Schedule F, failing to list his personal guaranty of a debt Tomray owed to Kubota

f. Original Schedule G, failing to list names and addresses of the landlords for his apartment and for the landlord of Zion church and failing to list his liability on the lease for the Taylor Rental Center

g. Original Schedule H, failing to list Tomray Enterprises and the Davises as co-debtors of the business debts.

h. Amended Schedule B, same errors as on original Schedule B, except that his mother's trust was now listed.

22. Do the number and variety of falsehoods demonstrate a reckless disregard for the truth, if indeed that is the standard? Finding a reckless disregard from circumstantial evidence is, by its nature, a question of judgment for the trier of fact. The court may weigh the fact that the items were of trivial value or worthless in deciding whether the debtor has fraudulent intent,

even if the items might be considered "material." The parties do not dispute that all the items of personal property omitted from the schedules were of inconsequential value to the estate. The court believes the Debtor's explanation regarding how he came to list these items on his schedules.

23. With regard to the schedules as a whole, the court concludes that while several of the items listed above were incorrect, Tomasek's answers for the remainder of his schedules were correct. While this court would like to have every debtor's schedules be perfectly correct, the standard for obtaining a discharge is not perfection. If only one item had been omitted from Debtor's schedules and it had been a valuable asset, such as a large checking account, the court may find in that circumstance that a discharge should be denied. In this case, the overwhelming majority of the items disclosed on the schedules were correct. The majority of the inaccurate answers concerned trivial matters or matters accurately disclosed elsewhere in the schedules. The court does not find that the falsehoods evidence a reckless disregard for the truth.

24. Section 727(a)(5) allows the court to deny a discharge to a debtor who has failed to explain satisfactorily any loss of assets or deficiency of assets to meet the debtor's liabilities. The Davises have failed to produce any evidence that Tomasek has failed to explain satisfactorily any loss of assets or deficiency of assets to meet his liabilities. Consequently, the court finds in favor of the Debtor on this count.

Witnesses

25. Debtor Tomasek testified before this Court in the trial of this adversary. His bankruptcy papers admittedly are sloppy and could have been completed with greater attention to detail.

However, after considering the Debtor's testimony, the Court does not believe the problems with the bankruptcy pleadings were made with the intent required by § 727 to bar discharge.

Conclusion

26. Because the Davises have failed to show that Tomasek has committed any act enumerated in 11 U.S.C. § 727(a), Tomasek's discharge will not be denied.

27. Because the Davises have failed to show that Tomasek has committed any act set forth in 11 U.S.C. § 523(a)(2), 11 U.S.C. § 523(a)(4), or 11 U.S.C. § 523(a)(6), any debt Tomasek may owe to the Davises is discharged.

28. Any finding of fact may be considered a conclusion of law.

Signed: 4/23/04

Harlin D. Hale
United States Bankruptcy Judge