

1 WRITTEN DECISION - NOT FOR PUBLICATION

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6 CLERK, U.S. BANKRUPTCY COURT
7 SOUTHERN DISTRICT OF CALIFORNIA
8 BY DEPUTY

9 UNITED STATES BANKRUPTCY COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re) Case No. 08-00194-PB7
12 TANYA NGOC NGUYEN,)
13 Debtor.) Adv. No. 08-90147-PB
14 _____) MEMORANDUM DECISION
15 ANDREW SCHACHER, A. SCHACHER)
16 & K. BRENNAN, LLC,)
17 Plaintiffs,)
18 v.)
19 TANYA NGOC NGUYEN,)
20 Defendant.)

21 This matter came on regularly for trial on creditor
22 Schacher's complaint objecting to debtor's discharge under
23 11 U.S.C. § 727(a)(4)(A). The LLC, A. Schacher & V. Brennan,
24 was also a named plaintiff, but not authorized to appear without
25 counsel. Mr. Schacher ably presented the position of the
26 plaintiff, while debtor was well represented by Mr. Hood.

1 The Court has subject matter jurisdiction over the
2 proceedings pursuant to 28 U.S.C. § 1334 and General Order
3 No. 312-D of the United States District Court for the Southern
4 District of California. This is a core proceeding under
5 28 U.S.C. § 157(b)(2)(J).

6 Section 727(a)(4)(A) provides:

7 (a) The court shall grant the debtor a
8 discharge, unless -

9 . . .

10 (4) The debtor knowingly and fraudulently,
in or in connection with the case -

11 (A) made a false oath or account;
12

13 In In re Coombs, 193 B.R. 557 (Bankr. S.D. CA 1996) this Court
14 reviewed the applicable law of § 727(a)(4)(A). That analysis is
15 repeated herein. Courts generally agree:

16 [T]he plaintiff must prove by a preponderance
17 of evidence that: (1) debtors made a
18 statement under oath; (2) the statement was
19 false; (3) debtor knew the statement was
false; (4) debtor made the statement with
fraudulent intent, and (5) the statement
related materially to the bankruptcy case.

20 In re Bailey, 147 B.R. 157, 162 (Bankr. N.D. Ill. 1992); In re
21 Metz, 150 B.R. 821, 824 (Bankr. M.D. Fla. 1993); In re Maletta,
22 159 B.R. 108, 112 (Bankr. D.Conn. 1993).

23 As one court put it:

24 The purpose of these requirements is to insure
25 that those interested in the case, in particular
the trustee, have accurate information upon which
26 they can rely without having to dig out the true
facts or conduct examinations. (Citations

1 omitted.) A debtor has an uncompromising duty to
2 disclose whatever ownership interest he holds in
3 property. It is the debtor's role to simply
4 consider the question carefully and answer it
5 completely and accurately. (Citation omitted.)
6 Even if the debtor thinks the assets are worthless
7 he must nonetheless make full disclosure.
8 (Citation omitted.) In completing the schedules it
9 is not for the debtor to pick and choose [sic]
10 which questions to answer and which not to.
11 Indeed, the debtor has no discretion--the
12 schedules are to be complete, thorough and
13 accurate in order that creditors may judge for
14 themselves the nature of the debtor's estate.
15 (Citation omitted.)

9 In re Lunday, 100 B.R. 502, 508 (Bankr. D.N.D. 1989); In re
10 Haverland, 150 B.R. 768, 770 (Bankr. S.D. Cal. 1993); In re
11 Maletta, 159 B.R. 108, 112 (Bankr. D. Conn. 1993).

12 Two of the indispensable elements of a cause of action under
13 § 727(a)(4)(A) are fraudulent intent and materiality. It is
14 generally recognized that:

15 A plaintiff can rarely produce direct
16 evidence of fraudulent intent; the requisite
17 actual intent to defraud may therefore be
18 established through proof of sufficient "badges of
19 fraud." (Citation omitted.) Such badges of fraud
20 include reservation of rights in or the beneficial
21 use of the transferred assets; inadequate
22 consideration; close friendship or relation to the
23 transferee; the financial condition of the
24 transferor both before and after the transfer; and
25 "'the existence or cumulative effect of a pattern
26 or series of transactions or course of conduct
after the incurring of debt, onset of financial
difficulties, or pendency or threat of suits by
creditors.'" (Citation omitted.)

23 [W]here there has been a "pattern of falsity,
24 or a "cumulative effect" of falsehoods, a
25 court may find that [fraudulent] intent has
26 been established.

Likewise, a court may infer fraudulent intent
under Code § 727(a)(4)(A) from a debtor's reckless

1 indifference to or cavalier disregard of the
2 truth.

3 In re Maletta, 159 B.R. 108, 112 (Bankr. D. Conn. 1993); In re
4 Gipe, 157 B.R. 171, 176-77 (Bankr. M.D. Fla. 1993); In re Metz,
5 150 B.R. 821, 824 (Bankr. M.D. Fla. 1993).

6 However:

7 The denial of a discharge under 11 U.S.C.
8 § 727 (a) (4) (A) cannot be imposed where the false
9 statement was the result of a simple or honest
10 mistake or inadvertence. (Citations omitted.)
11 Rather, to sustain an objection to discharge under
12 11 U.S.C. § 727(a) (4) (A), the debtor must have
13 willfully made a false statement with intent to
14 defraud his creditors. (Citation omitted.)

15 In re Bodenstein, 168 B.R. 23, 32 (Bankr. E.D.N.Y. 1994).

16 Similarly, "material misstatements, absent fraudulent intent, do
17 not warrant denial of a discharge under § 727(a) (4) (A)"

18 In re Parsell, 172 B.R. 226, 231 (Bankr. N.D. Ohio 1994).

19 In reviewing the many published decisions which have
20 considered whether the debtor should be denied a discharge, this
21 Court has been troubled by some which conclude a discharge should
22 be denied but do not explain how they found the requisite
23 fraudulent intent. It bears repeating that an essential element
24 under § 727(a) (4) (A) is that debtor acted with an actual intent
25 to defraud. To be sure, that intent may be proven by
26 circumstantial evidence. In re Devers, 759 F.2d 751, 753-54
(9th Cir. 1985); In re Schroff, 156 B.R. 250, 254 (Bankr. W.D.
Mo. 1993). And it may be inferred from all the surrounding
circumstances. Ibid. But there must be specific facts or

1 circumstances which point toward fraud. The court, in In re
2 Smith, 161 B.R. 989, 991 (Bankr. E.D. Ark. 1993) observed:

3 First, the debtor's actual intent must be found as
4 a matter of fact from the evidence presented. Of
5 course, the objecting party must generally rely on
6 a combination of circumstances which suggest that
7 the debtor harbored the necessary intent. The
8 Court may then draw an inference from this
9 evidence. (Emphasis added.)

10 Some courts have stated: "The fact that
11 numerous major assets were omitted will alone
12 satisfy the requirement that such omissions
13 be knowing and fraudulent."

14 In re Schroff, 156 B.R. 250, 256 (Bankr. W.D. Mo. 1993); In re
15 Shah, 169 B.R. 17, 21 (Bankr. E.D.N.Y. 1994). More than one
16 court has opined:

17 The Debtor's numerous omissions in his
18 Statement of Financial Affairs and Schedules,
19 taken together may constitute a pattern
20 demonstrating a reckless disregard for the
21 truth. (Citation omitted.) This reckless
22 disregard for the truth is widely recognized
23 as the equivalent to fraudulent intent.
24 (Citation omitted.)

25 In re Metz, 150 B.R. 821, 824 (Bankr. M.D. Fla. 1993). Such
26 conclusory statements are of little use to a court trying to
determine whether the requisite fraudulent intent exists in a
particular case. Competent facts placed in evidence must point
toward that fraudulent intent. If no facts point toward
fraudulent intent, it cannot be found simply by cumulating the
number of omissions. Neither sloppiness nor an absence of effort
by the debtor supports, by itself, an inference of fraud. Courts
which hold otherwise are simply devising a court-made

1 prophylactic rule that the debtor must make substantial effort
2 to provide accurate and complete schedules. Had the Congress
3 intended to make such a rule, it could have done so easily, as
4 it did with § 727(a)(3) (failure to keep adequate books and
5 records), and (a)(5) (failure to adequately explain
6 the loss of assets), neither of which have an express element
7 of fraudulent intent. In re Bodenstein, 168 B.R. 23, 33 (Bankr.
8 E.D.N.Y. 1994). But the Congress did not do so, and it is not
9 for the courts to create new bars to discharge under § 727(a), or
10 to so distort a requisite element as to make it no element at
11 all.

12 The essential point is that there must be something about
13 the adduced facts and circumstances which suggest that the debtor
14 intended to defraud creditors or the estate. For instance,
15 multiple omissions of material assets or information may well
16 support an inference of fraud if the nature of the assets or
17 transactions suggests that the debtor was aware of them at the
18 time of preparing the schedules and that there was something
19 about the assets or transactions which, because of their size or
20 nature, a debtor might want to conceal. For instance, in In re
21 Chalik, 748 F.2d 616, 618-19 (11th Cir. 1984), the debtor failed
22 to disclose dealings with twelve corporations of which he was the
23 sole or controlling shareholder and which had \$2.1 million in
24 assets and \$250,000 per month in income. The court in In re
25 Aboukhater, 165 B.R. 904, 910 (9th Cir. BAP 1994) looked to the
26 substantiality of the omission to support an inference of an

1 intent to defraud. In other words, is there something about the
2 omitted asset or transaction which a debtor might want to avoid
3 disclosing. That is why the so-called badges of fraud are
4 utilized to discern intent. In re Woodfield, 978 F.2d 516, 518
5 (9th Cir. 1992); In re Gipe, 157 B.R. 171, 176-77 (Bankr. M.D.
6 Fla. 1993). Another court has called them "factors to consider".
7 In re Schroff, 156 B.R. 250, 254-55 (Bankr. W.D. Mo. 1993).

8 A number of courts have considered the concept of
9 materiality. Most cited is In re Chalik, 748 F.2d 616, 618
10 (11th Cir. 1984). There, the court concluded:

11 The subject matter of a false oath is
12 "material," and thus sufficient to bar
13 discharge, if it bears a relationship to the
14 bankrupt's business transactions or estate, or
15 concerns the discovery of assets, business
16 dealings, or the existence and disposition of
17 his property The recalcitrant debtor may
18 not escape a section 727(a)(4)(A) denial of
19 discharge by asserting that the admittedly
20 omitted or falsely stated information concerned
21 a worthless business relationship or holding;
22 such a defense is specious. (Citation omitted.)
23 It makes no difference that he does not intend
24 to injure his creditors when he makes a false
25 statement. Creditors are entitled to judge for
26 themselves what will benefit, and what will
prejudice, them. (Citations omitted.) The
veracity of the bankrupt's statements is
essential to the successful administration of
the Bankruptcy Act. (Citation omitted.)

22 The court in In re Bailey, 147 B.R. 157, 162-63 (Bankr. N.D. Ill.
23 1992), reiterated the foregoing, and added several observations.
24 Quoting from Matter of Yonikus, 974 F.2d 901 (7th Cir. 1992), the
25 Bailey court stated "'[d]ebtors have an absolute duty to report
26 whatever interests they hold in property, even if they believe

1 their assets are worthless or unavailable to the bankruptcy
2 estate.'" The Bailey court continued: "This is because '[t]he
3 bankruptcy court, not the debtor, decides what property is exempt
4 from the bankruptcy estate.'"

5 The Bailey court then wrote at length:

6 10. Debtors in Chapter 7 proceedings have an
7 affirmative duty to disclose on their schedules of
8 assets whatever ownership interest they hold in
9 any property, inclusive of all legal and equitable
10 interest in said property, as of the commencement
11 of a bankruptcy case. (Citations omitted.) The
12 purpose behind 11 U.S.C. § 727(a)(4) is to enforce
13 debtors' duty of disclosure and to ensure that the
14 debtor provides reliable information to those who
15 have an interest in the administration of the
16 estate. (Citations omitted.) "Bankruptcy Trustees
17 lack the time and resources to play detective and
18 uncover all the assets and transactions of their
19 debtors." Since § 727(a)(4) relates to the
20 discovery of assets and enforces debtors' duty of
21 disclosure, an omission can be material, even if
22 the creditors were not prejudiced by the false
23 statement. (Citations omitted.)

24 11. Allowing debtors the discretion to not
25 report exempt or worthless property usurps the
26 role of the trustee, creditors, and the court by
denying them the opportunity to review the factual
and legal basis of debtors' claims. It also
permits dishonest debtors to shield questionable
claims concerning an asset's value and status as
an exemption from scrutiny. Therefore, the mere
fact that unreported property is thought to be
worthless or exempt is not a per se defense in a
§ 727(a)(4) action to bar discharge.

12. However, while the assertion that
property is worthless or exempt is not a per se
defense, it is a factor in determining
materiality, and several courts have found minor
omissions from debtors' schedules of assets to be
immaterial.

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1 See In re Cross, 156 B.R. 884, 889 (Bankr. D.R.I. 1993); In re
2 Gipe, 157 B.R. 171, 178 (Bankr. M.D. Fla. 1993); In re Haverland,
3 150 B.R. 768, 771-72 (Bankr. S.D. Cal. 1993).

4 This Court holds the opinion that there is little that will
5 prove to be immaterial for purposes of required disclosure if it
6 aids in understanding the debtor's financial affairs and
7 transactions. However, the "size and status of the omitted
8 assets" is directly relevant to determining the debtor's intent
9 and whether it was fraudulent. The distinction between the
10 prophylactic and inclusive concept of materiality in disclosure
11 should not blur the separate requirement of an actual intent to
12 defraud.

13 At the core of the dispute between Mr. Schacher and
14 Ms. Nguyen is that they entered into an agreement pursuant to
15 which Mr. Schacher sold a business called Xavier New York, Inc.
16 to Ms. Nguyen. The sale included an inventory of hair pieces.
17 Ms. Nguyen agreed to pay \$75,000 total; she paid \$3,000 up front,
18 and \$1,000 per month to December, 2007. In January, 2008 she
19 filed bankruptcy under Chapter 7. In seeking to block her
20 discharge, Mr. Schacher contends her bankruptcy schedules are
21 inaccurate, overstating her debt to him, while significantly
22 understating the value of the business Xavier New York, Inc..

23 In her Schedule B, debtor listed "100% Interest in Xavier
24 N.Y. Corp. (Hair extensions)" and placed a value of \$5,000 on it.
25 She also claimed it exempt on Schedule C, at the same value.
26 Mr. Schacher asserts that "the value of the inventory, alone,

1 when he transferred the business to Ms. Nguyen, was \$53,587, as
2 reflected on Xavier's 2007 balance sheet (Ex. 5A). Moreover, on
3 Xavier's 2007 year end tax return, the inventory balance was
4 shown as \$43,000, according to testimony of the accountant, Mr.
5 Polley.

6 Mr. Schacher also pointed to Schedule F filed by Ms. Nguyen,
7 in which she listed the debt to him at \$72,000. His argument is
8 that she gave no credit for the \$1,000 monthly payments she made
9 during the second half of 2007, which should have reduced the
10 debt to around \$66,000.

11 The accountant, Mr. Polley, testified that the inventory
12 value listed on a tax return is not a market value number, but
13 rather one drawn from a prior year's year-end number, plus
14 inventory acquired, and minus inventory sold in the intervening
15 year. It is a balance sheet number, not a value. Ms. Nguyen
16 testified that the \$5,000 value she ascribed to Xavier in her
17 Schedule B came from her assessment of what someone would pay at
18 a garage sale value for the hairpieces she had. She acknowledged
19 that if she could find a buyer or buyers who would pay retail
20 prices for the inventory, she could realize as much as \$249 per
21 item. (The Court notes that Ms. Nguyen's exhibit list included
22 416 bags of various sorts of hair extensions.) But, she
23 testified, she had little success selling the hair extensions in
24 the roughly six months she operated Xavier, saying gross sales
25 during that time were less than \$6,000, in total. Moreover, she
26 ///

1 testified her attorney asked her to put a value on Xavier's
2 inventory if it had to be liquidated.

3 One of Mr. Schacher's arguments, at least implicitly, was
4 that she must have believed the inventory had value for her to
5 agree to pay \$75,000 for the business. However, she pointed out
6 in testimony that she was also paying for the "right of
7 exclusivity" in distributing the product. On Ex. 5A, the balance
8 sheet, Mr. Schacher had put a \$50,000 value on that right. Also,
9 there was goodwill and a customer list.

10 Another of Mr. Schacher's concerns is that in March of 2008,
11 two months after filing the bankruptcy, Ms. Nguyen sold some hair
12 extensions to a Cosmo Zappoli in New York. However, so far as
13 the record reflects Xavier was a corporation and had not filed
14 bankruptcy, although its owner, Ms. Nguyen had. Xavier, as a
15 separate legal entity and a non-debtor, was not precluded from
16 engaging in business. Moreover, the conduct was two months post-
17 petition and did not implicate the debtor's oath.

18 It is unfortunate that Mr. Schacher did not timely perfect a
19 security interest in the assets of Xavier or some other
20 collateral put up by Ms. Nguyen. Indeed, Mr. Schacher has freely
21 acknowledged that circumstance. Further, on the present record
22 the Court could not conclude that when Ms. Nguyen first made the
23 agreement to purchase Xavier she had no intention of performing
24 her side of the bargain. To the contrary, she paid \$3,000 up
25 front, and \$1,000 per month for about six months before filing.

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1 During the trial, the Court was discomfitted by seeming
2 inconsistencies between Ms. Nguyen's testimony at the First
3 Meeting of Creditors and her testimony in court. Moreover, given
4 her apparent financial sophistication as reflected in her
5 Schedules A and B, it is hard to match that information against
6 the person she portrayed in court. But those misgivings are not
7 controlling.

8 Based on the testimony and the documentary evidence received
9 at trial, the Court finds and concludes that plaintiff, although
10 his case was presented well, has failed to carry his burden of
11 establishing by a preponderance of evidence that Ms. Nguyen
12 knowingly made false representations as to the value of Xavier or
13 of her debt to Mr. Schacher. Nor has he established that she
14 made any false representations with fraudulent intent.

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Conclusion

For the foregoing reasons, Mr. Schacher's objection to debtor's discharge, asserted under 11 U.S.C. § 727(a)(4)(A), shall be, and hereby is overruled.

Counsel for debtor shall prepare and lodge, within thirty (30) days of the date of entry of this Memorandum Decision, a separate form of judgment.

IT IS SO ORDERED.

DATED: FEB -5 2010



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court