UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

JOHN RANDALL PINCKLEY, SR.,
Individually and d/b/a RANDY PINCKLEY ROOFING — Case No. 96-23057-K

Debtor.

CAMCO ROOFING SUPPLIES, INC.,

Plaintiff,

v. — Adv. Proc. No. 96-0588

JOHN RANDALL PINCKLEY, SR.,
Individually and d/b/a RANDY PINCKLEY ROOFING,

Defendant.

MEMORANDUM AND ORDER RE "COMPLAINT OBJECTING TO DISCHARGE OF DEBTOR"

Plaintiff, Camco Roofing Supplies, Inc. ("Camco"), commenced this adversary proceeding against the defendant, John Randall Pinckley, Sr., individually and dba Randy Pinckley Roofing ("Mr. Pinckley"), seeking a denial of the general discharge under 11 U.S.C. § 727(a)(2)-(3).

By virtue of 28 U.S.C. § 157(b)(2)(J) this is a core proceeding.

Based on the sworn testimony at the trial conducted on November 4, 1996, the six trial exhibits, statements of counsel, and consideration of the case record as a whole, the court makes the following findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

The relevant background facts may be summarized as follows: Mr. Pinckley grew up on a farm. He is a high school graduate; has been married for 19 years; and has two minor children. After

graduation from high school in 1974, he worked with his father on a farm, in a service station, and in a wrecker business until 1979. From 1979 to mid-1993 Mr. Pinckley worked for GAF Corporation, the predecessor to ABC Supply Company, a roofing business. He started off there driving a truck and subsequently became a warehouse manager and outside salesman.

Due to a "management shake-up" at ABC Supply Company, he left that business in 1993 and started up his own roofing company, "Randy Pinckley Roofing Company," a sole proprietorship. Although Mr. Pinckley had no outside bookkeeper, Melinda Hawkins performed some in-house bookkeeping services for him at times relevant here. In 1994 his proprietorship roofing business grossed about $500,000 in sales and in 1995 about $695,000. An accountant was employed by Mr. Pinckley to prepare and file tax returns.

After a prior chapter 13 case was dismissed, on March 7, 1997, Mr. Pinckley individually (i.e., personally) and doing business as "Randy Pinckley Roofing" filed a petition under chapter 7 of the Bankruptcy Code. Barbara R. Loevy, Esquire was appointed Chapter 7 Trustee. Camco, by far Mr. Pinckley's largest creditor, was listed in the Schedule F as being the holder of a $60,000 business debt.

On May 31, 1996, Camco timely filed the instant complaint alleging statutory language under 11 U.S.C. § 727(a)(2)-(3), seeking to deny Mr. Pinckley's general discharge. Camco alleges that under section 727(a)(2) Mr. Pinckley made certain prepetition transfers or concealment of property with the intent to hinder, delay, and defraud creditors or the trustee. Camco further alleges under section 727(a)(3) that Mr. Pinckley concealed, destroyed, mutilated, falsified or failed to keep or preserve sufficient recorded information including books and records from which his financial condition and business transactions might be ascertained.

Mr. Pinckley thereafter answered Camco's complaint denying the relevant allegations contained in the complaint and also stated that Camco, through its local agent, "[a]fter Defendant had filed his petition under Chapter 7...continued to harass Defendant by 'stalking' Defendant's home, parking outside the home and obviously taking note of the comings and goings of Defendant and his family. After Defendant had

filed his petition under chapter 7, Plaintiff [Camco] contacted Defendant at his home by correspondence."[1]

One of the primary purposes of bankruptcy is to relieve an honest debtor from the weight of oppressive indebtedness and permit him/her to start afresh. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); *Perez v. Campbell*, 402 U.S. 623 (1971). A fresh financial start is afforded through discharge of all or a portion of the debtor's debts.

The primary purpose of chapter 7 from an individual debtor's standpoint is to obtain a discharge - that is, relief from indebtedness. A debtor contemplating seeking relief under the Bankruptcy Code, however, should not take the discharge for granted. A bankruptcy discharge is a privilege granted to the honest debtor and not a right accorded all debtors. *United States v. Kras*, 409 U.S. 434, 446 (1973) ("There is no constitutional right to obtain a discharge of one's debts in bankruptcy.") The "fresh start" concept provided by the Bankruptcy Code is a creature of congressional policy. See *In re Krohn*, 886 F.2d 123, 127 (6th Cir. 1989).

FED. R. BANKR. P. 4005 places upon an objecting plaintiff the burden of proving the objection to discharge and specifically provides as follows:

> At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection.

The Bankruptcy Code is silent about the appropriate measure of proof a plaintiff-trustee or creditor must demonstrate at a section 727(a) trial objecting to the debtor's general discharge. The standard of proof is by a preponderance of the evidence. *In re Adams*, 31 F.2d 389 (6th Cir. 1994); compare *Grogan v. Garner*, 498 U.S. 279 (1991) (decided under 11 U.S.C. § 523(a)).

A plaintiff-creditor or bankruptcy trustee under section 727(a)(2) must prove that the debtor possessed an actual intent to hinder, delay, or defraud when he/she transferred or concealed property. See, for

[1]No proof was adduced at the trial that Camco violated the automatic stay provisions contained in 11 U.S.C. § 362(a).

example, *In re Coggin*, 30 F.2d 1443, 1452 (11th Cir. 1994). Constructive fraud is insufficient. *In re Miller*, 39 F.2d 301, 306 (11th Cir. 1994). The grounds for denial of discharge must be proven specifically, and the proof must be directed at the transfer or concealment alleged. A debtor should not be denied a discharge on "general equitable considerations." *Rice v. Matthews*, 342 F.2d 301, 304 (5th Cir. 1965).

The Bankruptcy Code sets forth ten grounds for the denial of a discharge. The second ground is found in 11 U.S.C. § 727(a)(2), which provides in relevant part as follows:

> The court shall grant the debtor a discharge, unless -
> * * *
>
> (2) the debtor, with intent to hinder, delay or defraud a creditor or an officer of the state charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed or has permitted to be transferred, removed, destroyed, mutilated, or concealed -
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition.

Litigation under section 727(a)(2) has two components: (1) a transfer or concealment of property of the debtor or the estate and (2) an improper intent (i.e., a subjective intent to hinder, delay or defraud a creditor). The improper act can either be within one year of the petition or post-petition. *Rosen v. Bezner*, 996 F.2d 1527, 1531 (3rd Cir. 1993).

Although the trial primarily centered around the third ground for the denial of a discharge under 11 U.S.C. § 727(a)(3), discussed more fully, infra, Camco's complaint alleged the statutory language set forth in section 727(a)(2). At the trial there was some testimony, for example, that Mr. Pinckley did not disclose all the business account receivables.

Reviewing the schedules and statement of affairs as a whole and considering the sworn testimony of Mr. Pinckley, the court finds that he did not intend to conceal the existence of these accounts

receivable. A discharge may not be denied for omissions or misstatements in the debtor's schedules that are the result of inadvertence or honest mistakes. *In re Beaubouef*, 966 F.2d 174, 178 (5th Cir. 1992).

The bankruptcy discharge benefits are not intended to help debtors who have taken steps to purposely frustrate the orderly distribution of their assets. It has been said that great care should be taken in preparing the schedule of assets for review by the bankruptcy trustee, creditors, and court so as to avoid the appearance of inappropriate conduct. Although the concealment or transfer of a small amount of property may be enough to bar a discharge, the necessity of fraudulent intent must not be understated. See, for example, *Avallone v. Gross*, 309 F.2d 60 (2nd Cir. 1962). As explained by one court: "[i]t is not so much the acts of the bankrupt that will prevent his discharge, as it is the intent with which he acts." *In re Pioch*, 235 F. Supp. 678 (S.D.N.Y. 1955).

Mr. Pinckley testified in essence that several individuals including his brother owed him money; that his brother's one year old obligation was relatively small and probably not collectible and that the others would be subject to setoffs greater than the amount he was owed - that is, Mr. Pinckley owed them more than they owed him via damage claims because these account debtors had to hire other roofers to complete the roofing work at a cost in excess of what they owed Mr. Pinckley. He apparently dealt fairly with the business customers. Mr. Pinckley also testified that he issued a check in the amount of $2,300 to his wife shortly prior to bankruptcy. It was believed that the check was for living expenses, although the record is not exactly clear.[2] Prior to bankruptcy he sold a tar kettle for $3,800 that had a value in 1995 of $5,800 or $5,900. It is parenthetically observed that no creditor including Camco filed a complaint under 11 U.S.C. § 523(a) seeking to have particular debts excepted from the general discharge.

[2]The court directs that Mr. Pinckley promptly amend Schedule B, Item 20, and reflect such burdensome accounts receivables with appropriate explanations and also amend Schedule E to reflect the setoff claims. A copy of the amended schedules should be served by Mr. Pinckley on the Chapter 7 Trustee for her review. He also should provide more detailed information to the Chapter 7 Trustee concerning the circumstances surrounding the issuance of the $2,300 check.

Actual fraudulent intent may be inferred from the circumstances surrounding the transfer or concealment. *In re Woodfield*, 978 F.2d 516, 518 (9th Cir. 1992). Compare *In re Martin*, 761 F.2d 1163 (6th Cir. 1985). This is not an appropriate action to infer actual fraudulent intent.

Considering a totality of the particular facts and circumstances and applicable law and having observed witness demeanor and assessed credibility of Mr. Pinckley, the court concludes that Camco has failed to carry the required burden of proof under 11 U.S.C. § 727(a)(2) on the intent factor. Intent is a requisite element here. Although "red flags" were raised, this record does not support a legal conclusion that Mr. Pinckley undertook wrongful conduct or improper acts to purposely frustrate the orderly distribution of his assets or that he otherwise intentionally violated the provisions of section 727(a)(2). Accordingly, the court finds that Mr. Pinckley did not intentionally hinder, delay, or defraud creditors or the bankruptcy trustee as contemplated under 11 U.S.C. § 727(a)(2).

Camco also asserts a violation of 11 U.S.C. § 727(a)(3), which provides as follows:

> 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.

Adequate books and records relating to a debtor's financial history are important to facilitate an orderly administration of a bankruptcy case. Not surprisingly, the Bankruptcy Code denies a discharge to a debtor who has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any records from which the debtor's financial condition or business transactions may be ascertained. Such records may include cancelled checks, books, documents, receipts, ledgers, tax returns, or other recorded information. Fraudulent

intention is not a necessary element of this obligation. See, for example, *Meridian Bank v. Allen*, 958 F.2d 1226 (3rd Cir. 1992).

In *Meridian Bank v. Allen*, 958 F.2d 1226, the Court of Appeals for the Third Circuit affirmed the denial of a discharge of an attorney-debtor when financial records - both business and personal - were "virtually non-existent" and commented that a creditor objecting to the general discharge must show (1) that the debtor failed to maintain and preserve adequate records and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions.

The nature, type, form, and extent of business records required depends on many factors, including the specific occupation or business of the debtor. See, for example, *In re Halpern*, 387 F.2d 312 (3rd Cir. 1968); compare *Meridian Bank v. Allen*, supra; *In re Weiss*, 132 B.R. 588 (E.D. Ark. 1991) (discharge was denied where the debtor, a broker-dealer, failed to keep a "blotter" of all securities transactions as required by state law).

The bankruptcy court has broad discretion to determine the standards for keeping and preserving adequate records with respect to a particular debtor. See *Johnson v. Brockman*, 282 F.2d 544, 546 (10th Cir. 1960). Thus, "[i]t is well settled that the Bankruptcy Code does not dictate a rigid standard of perfection in keeping business records, and that the bankruptcy court should consider the failure to keep or preserve particular records on a case-by-case basis." *In re Weiss*, 132 B.R. 588, 593 (E.D. Ark. 1991). See also *Broad Nat'l Bank v. Kadison*, 26 B.R. 1015 (D.N.J. 1983); *In re Romano*, 196 F. Supp. 954 (E.D. Tenn. 1961).

In Cowans, *Bankruptcy Law And Practice* §§ 5.28 and 5.29 (6th ed.), the author states in relevant part at pages 722 through 726.

> ...Almost no individuals and few businesses keep a perfect set of books and records from which their financial condition and transactions may be determined. Absolute perfection is not demanded. Rarely can a creditor effectively assert inadequate books and records in a consumer or non-business bankruptcy. It is difficult to imagine that, absent some proof of falsification, any court

would find unsatisfactory a complete and recognized accounting system regularly maintained by competent personnel and regularly audited by a reputable firm of certified public accountants. However, anything short of this raises potential questions of adequacy in which court discretion may be involved. A "one-write" system of books kept in a restaurant business was deemed adequate in a Code case. (footnotes omitted.)

* * *

Few debtors have an adequate set of books. Many are not sufficiently methodical in nature to keep records. Of those who are so inclined, the decay in the state of finances often renders them unable or unwilling to engage assistance and quite often they are most reluctant to face the facts. When this condition exists, inquiring debtors must be advised that there is some risk that an objection to discharge will be raised. Debtors should be told that the keeping of some books or records will not necessarily be enough.

Significantly, intent is not an element of this ground of objection. Certain conduct such as falsification or mutilation will almost by definition bear a specific intent but in neither those instances nor in the possibly more significant instance of failure to keep books need the objector make any showing of intent on the part of the debtor.... (footnotes omitted.)

The court may choose not to be too harsh on the debtor, and allow the debtor a second chance to present additional data. There is authority that the objecting creditor must show that he was prejudiced by the lack of books or records. However, another decision recognized the creditor's right to complain of the debtor's failure to keep or preserve records even though the creditor could not show material injury related thereto. (footnotes omitted.)

* * *

What is required is a matter of reasonableness. If the debtor's financial affairs were large and complex, he will have to have kept adequate books and records. The standard for an employed person is whether persons in like situations would ordinarily keep books, or in other words a common practice standard, in light of all of a debtor's circumstances. The inquiry is directed at the education, experience and sophistication of the debtor, the volume of his or her business, the amount of credit the debtor used

> and anything else justice requires. (footnotes omitted.)
>
> * * *
>
> ...It is basic that the discharge is not reserved merely for the "perfect bookkeepers." (footnotes omitted.)

Query, how detailed must books and records be? Cowans, *Bankruptcy Law And Practice*, § 5.31 at 726 (6th ed.), states that "[t]he courts refuse to be pinned down to a precise definition." In *Burchett v. Myers*, 202 F.2d 920, 926 (9th Cir. 1953), the court stated:

> The test for determining when a bankrupt's books or records entitle him to a discharge in bankruptcy under Section 14c of the Bankruptcy Act is a loose one.*** There must be books or records from which the bankrupt's financial condition can be determined with a fair degree of accuracy and from which his business transactions can be traced for a reasonable period into the past.***The requirements are relaxed when the bankruptcy court is satisfied from all the circumstances in the case that the failure to keep adequate books or records was justified.***Each case rests on its own facts.***The question of the right to a discharge is addressed to the sound discretion of the bankruptcy court, with the exercise of which, except in the case of gross abuse, an appellate court will not interfere. (footnotes omitted.)

Courts also have taken into consideration the education of the debtor in determining the types of business records that should be required. One court denied a discharge after determining that the failure to keep adequate books and records was not justified in view of the debtor's college degree in accounting and postgraduate finance courses. *In re LeFebvre*, 1 B.R. 534 (M.D. Fla. 1979). In *In re Redfearn*, 29 B.R. 739 (E.D. Tex. 1983), the court held that a young self-employed farmer and rancher with only a high school education was not required to keep formal books and records from which his financial condition might be ascertained.

In the instant case Mr. Pinckley obviously failed to keep an absolute perfect set of books and records from which his financial condition and transactions may be determined. It would be an understatement to say that he is not a perfect bookkeeper. As noted earlier, however, many debtors do not

methodically keep an adequate set of books and records. Camco's complaint herein indeed raises legitimate questions of adequacy. Mr. Pinckley responsibly produced his bank statements, cancelled checks, general ledger pages, 1994 and 1995 income tax returns prepared by an accountant, and payroll W2 and 1099 reports. Additionally, he has provided oral explanations to clarify certain matters. Although Mr. Pinckley did not exactly operate his proprietorship out of his "hip pocket," he, like some other sole proprietors, clearly had a personal and perhaps even peculiar method of, inter alia, keeping up with the accounts payable and receivable and the potential warranty claims.

Considering a totality of the particular facts and circumstances including Mr. Pinckley's education, sophistication, the nature, size, type, form, and extent of his business and business records, and his sworn testimony, the court finds that his financial status and history have been sufficiently and reasonably explained. Although his books and records were not perfect and did not follow any methodical or particular recognized system, nonetheless a competent accountant by examining them could reasonably ascertain Mr. Pinckley's financial condition and business transactions for a reasonable period in the past. *In re LaBelle*, 112 F. Supp. 447 (S.D. Cal. 1953). The standard is whether the books and records reasonably reflect status and history. *In re Libowitz*, 53 F.2d 132 (S.D.N.H. 1931); *In re Doyle*, 272 F. Supp. 35 (S.D.N.Y. 1967). It is not impossible under the circumstances to ascertain Mr. Pinckley's financial condition and business transactions.

Mr. Pinckley is not a sophisticated businessman, but was rather a relatively young man with only a high school education who was trying to get a start in a business which he considered himself qualified (i.e., the roofing business). His proprietorship roofing business was not unduly complicated or large. He was initially a small businessman, whose business rapidly grew beyond his sophistication and administrative levels. He unfortunately did not employ an outside bookkeeper. It is the court's impression that Mr. Pinckley is an honest but unfortunate debtor who has cooperated with the trustee and the court.

Against this background and although this judicial call is not totally or absolutely free from doubt, based on the demeanor evidence and other evidence in the record, the court cannot find that Mr.

Pinckley's general discharge should denied under 11 U.S.C. § 727(a)(3). The denial of his general discharge is too harsh a result under a totality of these particular facts and circumstances. *In re Hughes*, 873 F.2d 262 (5th Cir. 1989). It is expressly emphasized here that objections to a discharge are strictly construed against the objector (i.e., Camco) and liberally in favor of the debtor (i.e., Mr. Pinckley). *Gleason v. Thaw*, 236 U.S. 558 (1915); *In re Ward*, 857 F.2d 1082, 1083 (6th Cir. 1988).

Camco has the burden of proof under section 727(a)(3) and has failed to carry it by a preponderance of the evidence.

Based on the foregoing and for the reasons stated,

IT IS ORDERED: That the complaint of the plaintiff, Camco Roofing Supplies, Inc. under 11 U.S.C. § 727(a)(2) and (3) against the defendant, John Randall Pinckley, Sr., individually and dba Randy Pinckley Roofing, is hereby denied.

IT IS FURTHER ORDERED that the general discharge of the above-named debtor-defendant, John Randall Pinckley, Sr., individually and dba Randy Pinckley Roofing, is hereby granted; and pursuant to FED. R. BANKR. P. 4004(g), once this order becomes final, the Bankruptcy Court Clerk shall promptly mail a copy of the final order of discharge to creditors and other parties in interest specified in subdivision (a) of this rule.

BY THE COURT

_____

DAVID S. KENNEDY
CHIEF UNITED STATES BANKRUPTCY JUDGE

DATE: November 7, 1996

cc: Arthur E. Quinn, Esquire
Robert F. Beckmann, Esquire
Attorneys for the Plaintiff
The Bogatin Law Firm, PLC
860 Ridge Lake Blvd., Suite 360
Memphis, TN 38120

Larry D. Austin, Esquire
Attorney for the Defendant
6256 Poplar Avenue
Memphis, TN 38119

Barbara R. Loevy, Esquire
Chapter 7 Trustee
4805 Northfield Circle
Memphis, TN 38128

Ellen B. Vergos, Esquire
United States Trustee for Region 8
200 Jefferson #400
Memphis, TN 38103