

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

In re

**RALPH L. JACKSON,
a/k/a LEE JACKSON**

Case No. 98-37848-K

**Debtor.
(SSN: 408-92-0368)**

Chapter 7

ACE MACHINE AND FABRICATING, INC.

Plaintiff,

v.

Adv. Proc. No. 98-0276

RALPH L. JACKSON,

Defendant.

**MEMORANDUM AND ORDER RE
“PLAINTIFF’S OBJECTION TO DISCHARGE”
COMBINED WITH NOTICE OF THE ENTRY THEREOF**

Introduction

Plaintiff, Ace Machine and Fabricating, Inc. (“Ace Machine”), commenced this adversary proceeding against the defendant-debtor, Ralph L. Jackson a.k.a. Lee Jackson (“Debtor”), seeking a denial of the debtor’s general discharge under 11 U.S.C. §§ 727(a)(2)(A) and 727(a)(4), or alternatively, seeking to except from the debtor’s discharge Ace Machine’s particular debt under 11 U.S.C. § 523(a)(6).

By virtue of 28 U.S.C. § 157(b)(2)(I) and (J), these are core proceedings. The court has jurisdiction of this action under 28 U.S.C. § § 1334 (a)- (b) and 157(a) and Miscellaneous District

Court Order No. 84-30 entered on July 11, 1984. Based on the sworn testimony adduced at the trial, the twenty- six (26) trial exhibits thereto, statements of counsel, and consideration of the entire case record as a whole, the court makes the following findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

FINDINGS OF FACT

At the trial of this adversary proceeding, the parties presented a Stipulation to the court that reads as follows and which the Court now adopts as part of its Findings of Fact¹:

1. On July 25, 1996, Ace [plaintiff-Ace Machine] filed Civil Warrant Number 639583, in the Court of General Sessions of Shelby County, Tennessee, seeking payment of past due accounts.
2. Jackson, individually, Ralph L. Jackson, LLC, and/or Ralph L. Jackson Company [defendant-debtor] became insolvent at least as early as sometime during the second quarter of 1996. On November 9, 1996, the Internal Revenue Service filed a Notice of Levy on Ralph L. Jackson, LLC for the tax period ending June 30, 1996, in the amount of \$92,721.53 for Unpaid Balance of Assessment for 941 Tax and \$2,764.82 for Statutory Additions, totaling \$95,486.35.
3. On September 3, 1996, the Court of General Sessions entered judgment in favor of Ace and the Defendant appealed on the same day. Judgment for Plaintiff [Ace

¹ In adopting this Stipulation as its partial findings of fact, the court has omitted all references to exhibits as they appeared in the Stipulation.

Machine] was rendered on November 22, 1996, for \$13,540.48 plus costs in both courts by the Circuit Court of Shelby County, Tennessee, Number 81209-2 T.D.

There was no appeal therefrom. A Certified copy of the Circuit Court judgment was recorded in the Register's Office of Shelby County, Tennessee, on January 27, 1997, at Instrument Number GJ 1075.

4. Jackson attempted to form a Mississippi limited liability company at the end of the calendar year 1995 and instructed his Mississippi lawyer to form a Mississippi limited company by filing the Certificate of Formation dated December 31, 1995. Jackson's attorney, however, did not file the Certificate of Formation, until August 20, 1996. Attached to the Certificate of Formation was a letter from Jackson's counsel stating that he was enclosing "a corrected Certificate of Formation". The Certification of Formation date August 21, 1996, did not become effective until August 27, 1996.²
5. Jackson was the organizer of the Ralph L. Jackson, LLC and its only member and sole owner. The Mississippi statute governing limited liability companies requires only one member.
6. Ralph L. Jackson, LLC was insolvent from the time it actually came into existence on August 27, 1996, as Jackson testified in his deposition of October 28, 1998.
7. On October 1, 1995, Ralph L. Jackson, LLC was the sole grantee of a warranty deed

² Debtor testified at the trial that he signed two Certificates of Formation one for the formation of Ralph L. Jackson, LLC and one for the formation of a "Servicing" business, in the office of Claude M. Purvis, his Mississippi attorney. Debtor also testified that the signatures on the two certificates are his, but that the date on the Certificate dated August 21, 1996, was not his. Debtor further testified that he did not sign this second certificate on August 21, 1996, and that he has not had any business dealing with Claude M. Purvis since December 31, 1995.

executed by O. L. Henders, Jr., being Instrument Number FS 3069 recorded in the Register's Office of Shelby County, Tennessee.

8. Ralph L. Jackson, LLC purportedly took title by that warranty deed to certain improved real property located on President's's Island consisting of part of Lot Number 118 and all of Lot Number 119 of the Memphis and Shelby County Port Commission's Industrial Subdivision, recorded in Plat Book 17, Page 2, in the Register's Office of Shelby County, Tennessee.
9. Concurrently with said warranty deed of October 1, 1995, a deed of trust, also dated October 1, 1995, was purportedly executed by Ralph L. Jackson, LLC as "mortgagor" to Cary R. Califf, as Trustee, for O. L. Henders, Jr. being Instrument Number ES 3070 recorded in said Register's Office, to secure a promissory note in the sum of \$425, 000 payable to O. L. Henders, Jr.
10. Said warranty deed date October 1, 995, and trust of deed were recorded on February 26, 1996. As it turns out, Ralph L. Jackson, LLC was not in existence on either date.
11. The aforesaid transaction between O. L. Henders, Jr. and Ralph L. Jackson, LLC attempted to consummate a real property sales contract executed by Henders on October 1, 1995, as seller, and Jackson, as purchaser on October 31, 1995. Those transactions were further evidenced by a settlement statement dated October 1, 1995, an Acknowledgment and Receipt of Settlement Statement dated October 1, 1995, and a loan amortization schedule.

12. By letter date July 8, 1996, Cary R. Califf, attorney for O. L. Henders, Jr., informed Jackson that Jackson and Ralph L. Jackson, LLC were in default of the promissory note and that payments for May, June, and July 1996, totaling \$19,011.16, were due. Califf also stated that if the arrearage was not paid he would proceed to foreclosure on behalf his client.
13. On September 13, 1996, Ralph L. Jackson, LLC , executed a quit claim deed to O.L. Henders, Jr., in lieu of foreclosure. This deed was recorded at Instrument Number GC 6670 in the Shelby County Register's Office. Although Jackson did not receive any consideration in the form of cash, he did receive a general release by Henders for himself and Ralph L. Jackson, LLC from any further liability under the promissory note and any other liability known or unknown, including any liability with respect to the financing and ownership of Lots 118 and 119 of the Memphis and Shelby County Port Commission's Industrial Subdivision.
14. On September 15, 1997, Ace filed in the Chancery Court of Shelby County, Tennessee, No. 109991-1 against Jackson and other defendants for writ of attachment of the aforesaid real property; for decree voiding a fraudulent conveyance; and for a decree that a trust deed defectively acknowledged is ineffective against plaintiff's judgment. A Lis pendens and Memorandum of Writ of Attachment Affecting Title, Use or Possession of Real Estate was recorded in the Register's Office of Shelby County, Tennessee, on December 12, 1997, being Instrument Number HA 8398 therein; and a Default Judgment in said Chancery suit was entered by said Court against Ralph L.

Jackson by its Order of February 20, 1998.

In addition to the facts as set forth in the parties' Stipulation, the court further finds as follows. Debtor, doing business as Ralph L. Jackson Company and/or as Ralph L. Jackson, LLC, operated a heavy metal fabrication business located on President's Island, Memphis, Tennessee. Mr. Luther Jackson, the debtor's father, had a prior 15 year business relationship with Ace Machine. In June 1996, the debtor's tax attorney referred him to his counsel in this bankruptcy case, who unsuccessfully instituted and attempted an extra-judicial workout agreement on behalf of the debtor. Subsequently, the debtor sought relief under the Bankruptcy Code.

Ace Machine contends, inter alia, that the debtor is not entitled to a general discharge under section 727(a)(2)(A) because the debtor quit-claimed the business real property on President's Island in lieu of foreclosure to Mr. O. L. Henders, Jr., the asserted first mortgage holder, and under section 727 (a)(4)(A) because the debtor failed to list the transferred property in his bankruptcy statement of affairs or schedules. Alternatively, Ace Machine asserts that its claim against the debtor should be excepted from discharge under section 523(a)(6) because Ace Machine's right to enforce its state court judgment was willfully and maliciously injured.

Debtor contends, inter alia, that the transfer of the business real property via a quit-claim deed in lieu of foreclosure to the first mortgagee, a non-insider, occurred more than one year prior to filing of the bankruptcy petition and the related concealment allegations are completely without merit. Debtor further contends that Act Machine's allegations under section 523(a)(6) also are completely without merit.

CONCLUSIONS OF LAW

Ace Machine seeks to have the debtor's general discharge denied under sections 727(a)(2)(A) and 727(a)(4)(A) of the Bankruptcy Code. Specifically, section 727(a) provides, in relevant part here, that an individual debtor shall be granted a discharge, unless S

(2) the debtor, with intent to hinder, delay, or defraud a creditor or any officer of the estate 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 filing of the petition;

(4) the debtor knowingly and fraudulently, in or in connection with the case –

(A) made a false oath or account.

11 U.S.C. § 727 (a)(2)(A) and (a)(4)(A).

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 (i.e., the standard of proof) is by a preponderance of the evidence. *In re Adams*, 31 F.3d 389 (6th Cir. 1994); compare *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991) (decided under 11 U.S.C. § 523(a)). The burden of proof under section 727(a) litigation is on the plaintiff-trustee or creditor (i.e., Ace Machine). *See* FED. R. BANKR. P. 4005.

A debtor will not be denied a discharge under section 727(a)(2) unless it is shown that the act complained of occurred (1) with respect to property of the debtor, within one year before the date of the filing of the bankruptcy petition, or (2) with respect to property of the estate, after the filing of the petition. If the objectionable act occurred more than a year before the bankruptcy, it may still provide

a basis for objection to discharge if a continuing concealment exists. A debtor's failure to disclose the transaction in the schedules or statement of affairs may provide evidence of concealment. See, for example, *Thibodeaux v. Olivier (In re Olivier)*, 819 F.2d 550 (5th Cir. 1987).

Section 727(a)(2) provides that the act complained of must be done with the intent to hinder, delay, or defraud a creditor or an officer of the estate. *Id.* Absent a specific intent to defraud creditors, a discharge should not be denied under this subsection. See *Moreno v. Ashworth (Matter of Moreno)*, 892 F.2d 417 (5th Cir. 1992). Objections to discharge should be liberally construed in favor of the debtor and strictly construed against the objector. *Gleason v. Thaw*, 236 U.S. 558 (1915); *Commerce Bank & Trust Co. v. Burgess (In re Burgess)*, 955 F.2d 134 (1st Cir. 1992). A transfer in good faith is one not made with actual intent to defraud. Transfers made by debtors in an attempt to keep their business alive and satisfy creditors are not, ipso facto, fraudulent. See *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301 (11th Cir. 1994). Although actual intent must be shown, a finding of actual intent may be based on circumstantial evidence or on inferences drawn from a course of conduct. See *In re Devers*, 759 F.2d 751 (9th Cir. 1985); *Farmers Co-op Ass'n v. Strunk*, 671 F.2d 391 (10th Cir. 1982).

In this adversary proceeding, Ace Machine contends, among other things, that the debtor fraudulently conveyed via a quit-claim deed the business real property in lieu of an actual foreclosure to the asserted first mortgage holder, Mr. O. L. Henders, Jr., a non-insider. Ace Machine asserts that although the alleged fraudulent conveyance occurred earlier than one year before the date the debtor's voluntary bankruptcy petition, the debtor has continued to conceal the transaction. Thus, it is alleged that the debtor's continued concealment falls within the one year period and disqualifies the debtor from

discharge under section 727(a)(2)(A).

Debtor testified that prior to bankruptcy he unsuccessfully attempted an extra-judicial workout plan seeking to salvage his business and satisfy creditors in an effort to avoid the bankruptcy court. As part of and in connection with the attempted extra-judicial workout plan, the debtor, in lieu of foreclosure, executed a quit-claim deed on September 13, 1996, regarding the President's Island property to Mr. O. L. Henders, Jr., the first mortgage holder. The real property is valued between \$400,000 and \$425,000. It should be emphasized here that this quit-claim deed by the debtor to Mr. Henders was recorded of public record on September 26, 1996. At the trial of this action, Cary R. Califf, Esquire,³ testified that for consideration for the quit-claimed deed back to Mr. O. L. Henders, Jr., the debtor and Mr. Henders executed mutual releases for which the debtor was released from a deficiency in the amount of \$19,011.16.

In light of the evidence put forth by the parties, the court finds under section 727(a)(2)(A) that the debtor did not have the intent to hinder, delay or defraud his creditors by concealment within the one year before the date of filing nor did the debtor engage in conduct that constitutes a continuing concealment. The court is persuaded that it was the debtor's intent to transfer the property back to the first mortgage holder to satisfy an obligation to the creditor in an effort to improve his troubled financial situation and scale back on the business operations.

With regard to the Ace Machine's section 727(a)(4)(A) allegations, a debtor may be denied a discharge if the debtor "knowingly and fraudulently, in or in connection with the case made a false oath

³ Cary R. Califf, Esquire, was the closing attorney for O. L. Henders, Jr.

or account.” Ace Machine alleges that the debtor here knowingly and fraudulently omitted assets from his bankruptcy schedules and statement of affairs, and thus, has made a false oath under section 727(a)(4)(A) when declaring under penalty of perjury that the schedules and statement of affairs are “true and correct”.

Ace Machine also contends that the debtor in this chapter 7 case and in a prior chapter 13 case filed on or about December 9, 1997, knowingly failed to disclose his individual interest in the transferred real property, the interest of Ralph L. Jackson LLC, the value of the real estate, or its equity as of the date of the quit-claim deed to Mr. Henders in lieu of foreclosure. Further, Ace Machine contends that the debtor attempted to conceal the lawsuit that it had filed in General Sessions, which was appealed to the Shelby County Circuit Court.⁴

Debtor testified at the trial of this adversary proceeding that in preparation of his earlier chapter 13 schedules and statement of affairs, he was advised by his attorney to list only debts that he was personally liable to pay. Debtor fully explained at the trial that if he thought that a debt was solely one attributable to the LLC, he did not list it on the bankruptcy schedules. As to the transfer of the business real property located on President’s Island, the debtor testified it was not scheduled because the quitclaim deed was executed and recorded of public record more than one year prior to the filing of the bankruptcy case. Moreover, contrary to Ace Machine’s assertions that the debtor’s appeal suit of Ace Machine’s General Sessions judgment was not listed in the bankruptcy papers, it is noted that ¶ 4b of the bankruptcy statement of affairs specifically referred to the litigation commenced by Ace Machine in

⁴The General Sessions Court suit was filed on July 25, 1996; and judgment for plaintiff-Ace Machine was entered on September 3, 1996, and appealed by the debtor on September 3, 1996 to the Circuit Court of Shelby County, Tennessee.

the state court (discussed more fully, *infra*.)

The First Circuit Court of Appeals found that “an explanation by a bankrupt that he had acted upon advice of counsel who in turn was fully aware of all the relevant facts generally rebuts an inference of fraud”.⁵ Omissions caused by innocent mistake or upon honest advice of counsel, to whom the debtor had disclosed all the relevant facts, will not be deemed willfully false, and the discharge should not be denied because of it.⁶ Accordingly, the court finds, considering the totality of the particular facts and circumstances and applicable law, that the debtor’s conduct does not reflect or reveal that he knowingly or fraudulently made a false oath in connection with this chapter 7 case or his prior chapter 13 case, as contemplated in section 727(a)(4)(A) of the Bankruptcy Code.

Alternatively, Ace Machine seeks to have its particular debt judicially declared non-dischargeable under 11 U.S.C. § 523(a)(6), which section provides that:

(a) A discharge under section 727 *** of this title does not discharge an individual debtor from any debt -

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity –

11 U.S.C. § 523(a)(6). For a debt to be non-dischargeable under section 523(a)(6), the actions of the debtor must cause an injury that is an intentional or deliberate act that leads to injury. *In re Geiger*, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998) (holding that debts arising from recklessly or negligently inflicted injuries do not fall within the compass of section 523(a)(6)). See also *In re*

⁵ *Matter of Mascolo*, 505 F.2d 274 (1st Cir. 1974); see also *Imperial Millwork, Inc. v. Steinberg (In re Steinberg)*, 4 B.R. 593 (Bankr. D. Md. 1980).

⁶ *Matter of Mascolo*, 505, F.2d 277.

Perkins, 817 F.2d 392 (6th Cir. 1987), cert. denied, 484 U.S. 853 (1987); *Tinker v. Colwell*, 193 U.S. 473 (1904).

Ace Machine argues that the debtor's omission from the schedules of his individual interest in the business real property located on President's Island, the interest of Ralph L. Jackson LLC, the value of the real estate, or its equity as of the date of the quit claim deed in lieu of foreclosure constitutes an act that should except Ace Machine's claim from the debtor's general discharge by virtue of section 523(a)(6). Reviewing the schedules and statement of affairs as a whole and considering the totality of the particular facts and circumstances including the sworn testimony of the debtor at the trial and in his deposition, the court further finds that the debtor did not willfully and maliciously injure Ace Machine or property of Ace Machine as contemplated in section 523(a)(6) of the Bankruptcy Code.

With respect to the judgment entered against the debtor in the Chancery Court of Shelby County, being Cause No. 10999-1, the debtor submits that in Ace Machine's motion for relief from the automatic stay signed by Ace Machine's counsel on January 15, 1998, Ace Machine stated the debtor was likely to be a witness in the related Chancery Court proceeding and that no money judgment was sought against the defendant. Based upon the representations in the section 362(d)(1) motion of Ace Machine, the debtor states that he allowed a postbankruptcy default judgment to be entered against him. As noted earlier, the debtor did in fact list the General Sessions Court judgment and its pending appeal in Circuit Court as well as the Chancery Court action against the debtor.⁷

⁷More specially, ¶ 4b of the debtor's bankruptcy statement of affairs asked the following question, which the debtor answered as follows:

- b. Describe all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the

Considering a totality of the particular facts and circumstances and applicable law, the court finds that Ace Machine has the burden of proof under section 727(a)(2) and (a)(4) and section 523(a)(6) and that Ace Machine has failed to carry its required burden by the preponderance of the evidence standard. As stated earlier, objections and exceptions to the operation of a bankruptcy discharge are strictly construed against the objector and liberally in favor of the debtor.

ORDER AND NOTICE OF THE ENTRY THEREOF

Based on the foregoing findings of fact and conclusions of law,

IT IS ORDERED AND NOTICE IS HEREBY GIVEN that the complaint of the plaintiff, Act Machine and Fabricating, Inc., against the defendant-debtor, Ralph Jackson, is hereby denied.

BY THE COURT

**DAVID S. KENNEDY
CHIEF UNITED STATES BANKRUPTCY JUDGE**

DATE: April 29, 1999

commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY
Ace Machine and Fabricating, Inc. 137 West Peebles Road Memphis, TN 38109	filed on 9/15/97-Chancery Court, Shelby Co. TN 109991-1	Complaint (1) For Writ of Attachment of Real Estate (2) Decree voiding a Fraudulent Conveyance and (3) For a Decree that a Trust Deed Defectively Acknowledged is Ineffective Against Plaintiff's Judgement (sic)

Ralph L. Jackson aka Lee Jackson, Chapter 7 Case No. 98-37848
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