

Not intended for publication



Dated: May 26, 2005
The following is SO ORDERED.

A handwritten signature in cursive script that reads "G. Harvey Boswell".

G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

BENJAMIN W. NEILL,

Debtor.

JAMES H. BARNHILL,

Plaintiff,

v.

BENJAMIN W. NEILL,

Defendant

CASE NO. 02-14772

Chapter 7

Adv. Pro. No. 04-5249

MEMORANDUM OPINION AND ORDER RE PLAINTIFF'S
COMPLAINT TO DETERMINE DISCHARGEABILITY

The Court conducted a trial pursuant to FED. R. BANKR. P. 7001 on plaintiff's complaint to determine dischargeability on April 4, 2005. Resolution of this matter is a core proceeding. 28 U.S.C. § 157(b)(2)(I). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The parties in this matter entered into a "sales agreement" on May 11, 2002, whereby the debtor Benjamin Neill, (hereinafter "Neill" or "debtor") agreed to purchase three sod farms from the plaintiff James Barnhill, (hereinafter "Barnhill"). Two of the sod farms consisted of 18 acres and the other farm consisted of 200 acres. Neill also agreed to purchase "all sod related equipment" from Barnhill. The purchase price of the farms and equipment was \$1,700,000.00. The contract was amended on May 16, 2002, to increase the purchase price to \$1,750,000.00.

Pursuant to the terms of the contract, Neill was to pay 1% of the purchase price to Barnhill every 30 days from the effective date of the contract until the date of the closing. These payments were to be deposited in escrow as part of the earnest money for the contract. Neill was also required to deposit 70% of all sod sales in escrow as part of the earnest money. The contract further stated that Neill would begin full operation of the sod farms with an "acceptable commitment letter from lender of buyer's choice" within ten days from the effective date of the contract. If Neill failed to get such a letter, the contract would be "null and void" and Neill would forfeit any and all earnest money to Barnhill. The parties agreed that the contract would close on or before August 11, 2002.

Neill deposited the 1% monthly payment of \$17,000.00 into the escrow account on May 13, 2002, June 13, 2002 and July 15, 2002. Neill also deposited \$112.50 on May 28, 2002, \$911.50 on June 13, 2002, \$220.00 on June 13, 2002, \$250.00 on June 13, 2002, and \$3,213.00 on July 19, 2002, which represented 70% of the sod sales he was making while operating the farms.

Due to the pending expiration of the first agreement, the parties entered into a new sales agreement for the purchase of the farms on July 23, 2002.¹ Page one of the this new agreement lists the purchase price of the three farms as \$1,709,200.00, but the second page eliminated the two smaller farms and reduced the price to \$1,500,000.00. As in the original agreement, Neill agreed to deposit 1% of the purchase price on a monthly basis and 70% of all sod sales as earnest money for the contract. If Neill failed to obtain financing, he would forfeit these earnest monies to Barnhill and Shaw-Rinks Real Estate company. Barnhill would receive 80% of these monies and the real estate company would keep 20%.

¹Although the original sales agreement entered into by Neill and Barnhill did not expire until August 12, 2002, the parties entered into the new agreement on July 23, 2002. Neither party testified as to why the new contract was entered into prior to the expiration of the first one. The Court assumes that Neill was unable to obtain the commitment letter from a lender and therefore the parties decided to enter into a new contract.

A form titled “Earnest Money Released” was attached to the July 23, 2002, contract. According to this form, \$40,800.00 was disbursed to Barnhill out of the escrow account by the real estate company on August 12, 2002.² This amount represented 80% of the three \$17,000.00 monthly deposits made by Neill in May, June and July 2002. The remaining \$10,200.00 of the monthly payments was to remain in the escrow account as part of the earnest money for the second contract. In the event either party defaulted on the contract, Shaw-Rinks Real Estate Company would retain this money. This form also states that the \$4,707.00 Neill deposited in the escrow account as 70% of the sod sales in May, June and July 2002, would remain in the escrow account.

As with the first contract, the parties agreed that if Neill failed to obtain the necessary financing or if Neill breached the agreement in any way, he would forfeit any and all earnest monies to Barnhill and the real estate company. The contract specified that the agreement would close on or before October 11, 2002.

Neill made a \$17,000.00 deposit to the escrow account on August 12, 2002. In September 2002, Neill transferred a MasterCraft boat to Barnhill in lieu of the \$17,000.00 monthly payment. According to Barnhill’s testimony at the trial, the value of this boat was \$14,000.00.³ Shaw-Rinks Real Estate issued a \$18,307.00 check to Barnhill on October 14, 2002. This check represented 80% of the August 12, 2002, \$17,000.00 payment and the \$4,707.00 in sod sales Neill had deposited in the escrow account between May 13, 2002, and July 19, 2002.

After entering into the second contract for the sale of the sod farm, Neill did not deposit any money into the escrow account when he sold sod. Neill testified that he was not able to make these deposits because he was struggling to make the \$17,000.00 monthly payment and because his other businesses were struggling as well. Neill introduced into evidence a list of all sod sales made by him between June 27, 2002, and September 10, 2002. The total value of these sales was \$11,583.75. Neill did not deposit any portion of these monies into the escrow account. According to Neill’s calculations and testimony, he should have deposited \$8,108.62 of this money into the escrow account as 70% of the sod sales. Neill intended to pay Barnhill the \$8,108.62 out of the money he would get back at the closing of the contract.

²Another form attached to the July 23, 2002, contract stated that Barnhill would pay the \$40,800.00 that was released to him back to Neill at the closing of the contract. Neill would use this money as earnest money for the second contract.

³Barnhill and Shaw-Rinks Real Estate agreed that Shaw-Rinks would not take a commission on the value of the boat; therefore, 100% of the boat was transferred by Neill to Barnhill.

Although Neill made diligent efforts to obtain financing for the purchase of the sod farm, he was unable to do so and the parties were unable to close on the contract. Pursuant to the terms of the sales agreements, Neill forfeited any and all monies he had deposited in the escrow account when he failed to obtain the necessary financing. Neill paid a total of \$72,707.00 in cash under the contract along with the MasterCraft boat valued at \$14,000.00. Barnhill received a total of \$73,107.00 of these monies. Barnhill has since sold his sod farms to a third party.

On January 20, 2004, Barnhill filed a suit against Neill in the General Sessions Court of Hardin County. According to the summons issued in the case, Barnhill alleged that Neill sold over three acres of sod without remitting any money to him. Barnhill alleged the value of this sod was “over \$15,000.” Barnhill also asserted that Neill owed him for operating expenses and maintenance costs that Neill was supposed to have paid while operating the farm. Pursuant to the summons, Neill left diesel tanks empty and damaged or removed certain pieces of equipment.

The Hardin County General Sessions Court entered a judgment for Barnhill on April 2, 2004, in the amount of \$14,999.99 plus interest at the rate of 10%. According to Trial Exhibit 4, the court conducted a trial in the matter. The General Sessions Court did not indicate on what grounds they based Neill’s liability. Barnhill did not present any proof at the trial on his dischargeability complaint as to the grounds for the state court judgment nor did he introduce a transcript of the General Sessions proceedings. Neill’s attorney stated at the trial in the case at bar that it was a breach of contract action. Barnhill did not dispute this assertion.

At the trial in this matter, Barnhill alleged that Neill owes him \$20,599.50 and that this amount should be non-dischargeable under both 11 U.S.C. § 523(a)(2)(A) and § 523(a)(4). The total amount Barnhill asserts he is owed includes \$2,437.50 for items that were allegedly missing when Neill surrendered the sod farm back to Barnhill and \$18,162.00 in sod sales. Barnhill alleges that Neill sold \$32,670.00 in sod while he possessed the farms, but only deposited \$4,707.00 in the escrow account. Had Neill placed 70% of all alleged sales in the escrow account, there would have been a total of \$22,869.00 in escrow according to Barnhill’s calculations.

In calculating the amount of sod Neill allegedly sold but did not put in escrow, Barnhill consulted an aerial photograph of the sod farms and measured off the amount of sod that he asserts had been sold. Barnhill alleges that Neill sold some of this sod and that he also took some of the sod for his own use. Barnhill did not present any proof, other than his own testimony, of the sale or misappropriation of this sod. He had no receipts or affidavits showing that Neill sold this sod to third parties nor did he present any proof that Neill used the sod for an improper purpose. Neill testified that he only sold \$11,583.75 worth of sod

between June 27, 2002, and September 10, 2002. He provided the Court with a detailed list of dates, buyers’ names and prices for these sales. He also testified that he gave some samples away and used some sod to advertise his product, but that this was normal in the sod business.

As to the allegations of missing items, Neill testified that he did not take any equipment from the farm when he surrendered it. When he sold sod, he sold them on the wooden pallets and did not get those pallets back after selling the sod. He did admit that he damaged one irrigation pipe when he was bush hogging the property, but stated that this was an accident and not an intentional destruction of property. During the entire time he occupied the farm, Neill maintained the property and kept the sod irrigated. During the entire time the contracts were in effect, Neill testified that he acted in good faith in trying to get financing for the purchase.

II. CONCLUSIONS OF LAW

There are four main issues for the Court to decide in this case. First, Barnhill has alleged that he is entitled to a non-dischargeable judgment against the debtor because of his Hardin County General Sessions Court judgment. Secondly, Barnhill has alleged that Neill fraudulently sold the sod and did not deposit the required 70% in the escrow account in violation of 11 U.S.C. § 523(a)(2)(A). Third, Barnhill has alleged that in not depositing 70% of the alleged sales in the escrow account, Neill embezzled money and/or violated a fiduciary duty in violation of 11 U.S.C. § 523(a)(4). Lastly, Barnhill has alleged that Neill violated several sections of 11 U.S.C. § 727 and should be denied a general discharge of all his debts. The Court will address each issue separately.

A. Hardin County General Sessions Judgment

Barnhill has alleged that the Hardin County General Sessions Court judgment entitles him to a non-dischargeability judgment against the debtor under either 11 U.S.C. § 523(a)(2)(A) or § 523(a)(4). The debtor has asserted that the general sessions judgment was for breach of contract only and does not supply any of the grounds for a non-dischargeable judgment against him. Neither party presented any proof of the General Sessions Court findings or judgment to this Court.

The United States Supreme Court has recognized that the principle of collateral estoppel applies in bankruptcy dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279, 284 n.11, 111 S.Ct. 654, 658, n. 11, 112 L.Ed.2d 755 (1991). “In determining whether to accord preclusive effect to a state-court judgment, we begin with the fundamental principle that ‘judicial proceedings [of any court of any state] shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.’” *Rally Hill Productions v. Bursack (In re Bursack)*, 65

F.3d 51, 53 (6th Cir. 1995) (citing 28 U.S.C. § 1738). The fact that bankruptcy courts have exclusive jurisdiction over dischargeability issues, see 11 U.S.C. § 523(c), does not negate this rule. *Bursack*, 65 F.3d at 53 (“a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts.”).

“In cases involving claims within the exclusive jurisdiction of the federal courts, a court determining whether or not to apply collateral estoppel first must determine if a state court judgment would receive preclusive effect in the state where it was rendered.” *Id.* (citing *Marese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 386, 105 S.Ct. 1327, 1334-35, 84 L.Ed.2d 274 (1985)). In Tennessee, “an unreversed judgment of General Sessions Court is as final as a judgment rendered in a court of record.” *O’Rourke v. Wyllie (In re O’Rourke)*, 169 B.R. 383, 385 (M.D. Tenn. 1994). Courts are entitled to apply collateral estoppel to such judgments only when the issue in question (1) was raised in an earlier case between the same parties, (2) was actually litigated and decided, and (3) was necessary to the judgment in the earlier case. *Massengill v. Scott*, 738 S.W.2d 629, 631 (Tenn. 1987).

In the case at bar, it is true that Barnhill received a judgment against Neill from the Hardin County General Sessions Court; however, Barnhill did not present any proof of the basis for this judgment, nor did he present any proof as to what issues were actually litigated and decided in that case. This Court has no way of knowing if Barnhill even raised the issue of fraud in the General Sessions suit. Barnhill said nothing about the judgment except that the General Sessions Court had granted it to him; however, at several points during the trial, Neill’s attorney made the assertion that the judgment was for simple breach of contract. Barnhill did not dispute this assertion.

There is simply no proof that the Hardin County General Sessions Court made any findings that the debtor committed fraud, made a false representation, acted under false pretenses, embezzled, committed larceny, or even had a fiduciary duty, let alone violated it in some way. It appears that the General Sessions Court did not find Neill liable for any behavior that would give rise to a non-dischargeable judgment under either 11 U.S.C. § 523(a)(2)(A) or § 523(a)(4). As a result, the Court finds that the principle of collateral estoppel does not apply to the Hardin County General Sessions judgment in this case.

B. 11 U.S.C. § 523(a)(2)(A)

Section 523(a)(2)(A) of the Bankruptcy Code provides that:

(a) A discharge under section 727, 1141, 1228[a] 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

 . . .
(2) for money, property, services, an extension, renewal, or refinancing of credit, to the extent obtained, by -

 (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.

11 U.S.C. § 523(a)(2)(A). The terms “false pretenses,” “false representation” and “actual fraud” are not defined by the Bankruptcy Code. As a result, courts have had the responsibility for setting their boundaries.

In the case of *Field v. Mans*, the U.S. Supreme Court held that the terms used in § 523(a)(2)(A):

 . . . carry the acquired meaning of terms of art. They are common law terms, and . . . in the case of “actual fraud,” . . . they imply elements that the common law has defined them to include.

Field, 516 U.S. 59, 70, 116 S.Ct. 437, 443 (1995).

In following the Supreme Court mandate announced in *Field v. Mans*, all courts have unanimously held that, as used in § 523(a)(2)(A), “[a]ctual fraud involves moral turpitude and does not include fraud implied in law which may exist without imputation of bad faith or intentional wrong.” *In re Pommerer*, 10 B.R. 935, 939 (Bankr. D. Minn. 1981). For a creditor to succeed in excepting a debt from discharge, the debtor must have engaged in some conduct which can be fairly said to be “blameworthy.” *In re Anderson*, 181 B.R. 943, 948 (Bankr. D. Minn. 1995). If a creditor is unable to show that the debtor acted with a deliberate intent to deceive, he will be unsuccessful in his claim.

In addition to agreeing on what type of fraudulent behavior § 523(a)(2)(A) covers, courts are also unanimous in the procedural aspects of such an action. First, the party asking for the exception to discharge bears the burden of proof in a § 523(a)(2)(A) cause of action. *In re Rembert*, 141 F.3d 277, 281 (6th Cir. 1998); *In re Martin*, 698 F.2d 882, 887 (7th Cir. 1983). Secondly, exceptions to discharge are to be strictly construed against the creditor and liberally in favor of the debtor. *Rembert*, 141 at 281; *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985). Thirdly, all courts agree that the burden of proof on the objecting creditor is a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991). These approaches have received widespread acceptance from courts because they are thought to further the well-espoused bankruptcy policy of granting the honest, but unfortunate debtor a fresh start in bankruptcy. *In re Balzano*,

127 B.R. 524, 529 (Bankr. E.D.N.Y. 1991); *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934).

Another well-settled area of § 523(a)(2)(A) law concerns the elements of proof that a claim for an exception to discharge includes. In order to have a debt declared nondischargeable pursuant to this section, the creditor must prove that the debtor (1) committed actual fraud, (2) acted under false pretenses or (3) made a material misrepresentation. When making an allegation of “actual fraud,” a creditor must demonstrate that the debtor engaged in some behavior which he used to “gain an advantage over another by false suggestions or by the suppression of truth.” *In re Vitanovich*, 259 B.R. 873, 877 (B.A.P. 6th Cir. 2001) (“No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.”).

If, instead of alleging the debtor committed actual fraud, the creditor asserts that the debtor made a misrepresentation, the creditor must prove that (1) the debtor made a material representation, (2) the debtor knew the representation was false at the time of making it, or made the representation with gross recklessness as to the truth, (3) the debtor made the representation with the intention of deceiving the creditor, (4) the creditor justifiably relied upon such representation, and (5) the creditor sustained loss and damage as the proximate result of the representations. *Rembert*, 141 F.3d at 280; *In re McLaren*, 3 F.3d 958 (6th Cir. 1993), *Field*, 116 S.Ct. at 446. According to the law in the Sixth Circuit, a court must use a subjective standard to determine whether or not a debtor possessed an intent to defraud a creditor within the scope of § 523(a)(2)(A). *Rembert*, 141 F.3d at 281.

One of the most important factors that a court must keep in mind when analyzing a § 523(a)(2)(A) issue is that “[t]he wrongdoing which is actionable under § 523(a)(2)(A) must have been committed at the time the debt at issue is incurred, not at the time some other alleged wrongdoing occurred.” *Butler v. Clark (In re Clark)*, 202 B.R. 243, 253 (Bankr. W.D. Mich. 1996). When the debt at issue arises under a contract, courts must be especially mindful of this requirement for it is the debtor’s intention at the time the contract is entered into and not his subsequent behavior which is important. *Lail v. Weaver (In re Weaver)*, 174 B.R. 85, 90 (Bankr. E.D. Tenn. 1994). Courts “generally agree that a breach of contract alone will not establish an intent to defraud.” *Id.*; *Cono v. Wheatley (In re Wheatley)*, 158 B.R. 140, 145 (Bankr. W.D. Mo. 1993); *Waitman v. Steed (In re Steed)*, 157 B.R. 355, 358 (Bankr. N.D. Ohio 1993). “[P]roof of a subsequent failure, by itself, is not enough to deem the original transaction fraudulent.” *Id.*

In the case at bar, Neill incurred the debt with Barnhill when he entered into the sales agreements on May 11, 2002, and July 23, 2002. At the time of signing those contracts, the Court finds that Neill intended

to fulfill all his obligations under the agreements. Barnhill did not present any proof to the Court that Neill did not intend to do both of these things when he signed the contracts. In fact, the proof showed that Neill made the payments and deposits as he promised to do for the first few weeks of the contracts. Neill testified that he stopped depositing the 70% of sod sales into the escrow account because he could not afford to do so. At the time, he was struggling to make the monthly \$17,000.00 payment. Neill also testified that when the contract closed, he anticipated getting some of his earnest money back and using that money to make the 70% payments to Barnhill.that he was unable to make between June and September of 2002.

Quite simply, Barnhill did not present any proof which demonstrated Neill possessed a fraudulent intent or a desire to make a false representation at the time he entered into the agreements or at any time during the pendency of the contracts. Neill entered into the agreements thinking he would be able to make the deposits and discovered that he was unable to do so. Although this was clearly a breach of his duties under the contract, it does not rise to the level of fraud or false representation as contemplated under 11 U.S.C. § 523(a)(2)(A).

C. 11 U.S.C. § 523(a)(4)

Section 523(a)(2)(A) of the Bankruptcy Code provides that:

(a) A discharge under section 727, 1141, 1228[a] 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

...
(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny,

11 U.S.C. § 523(a)(4). As with § 523(a)(2)(A), the creditor seeking an exception to discharge under this section bears the burden of proof by a preponderance of the evidence. *Grogan*, 498 U.S. at 291. Exceptions to discharge are to be strictly construed against the creditor and liberally in favor of the debtor. *Rembert*, 141 at 281.

In this case, Barnhill has alleged that the debtor embezzled money in violation of this code section and/or committed fraud while acting in a fiduciary capacity. The Court will address Barnhill’s embezzlement allegation first. “Federal law defines ‘embezzlement’ under section 523(a)(4) as ‘the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come.’” *Gribble v. Carlton (In re Carlton)*, 26 B.R. 202, 205 (Bankr. M.D. Tenn.1982) (quoting *Moore v. United States*, 160 U.S. 268, 269, 16 S.Ct. 294, 295, 40 L.Ed. 422 (1895)). “A creditor proves embezzlement by showing that he entrusted his property to the debtor, the debtor appropriated the property

for a use other than that for which it was entrusted, and the circumstances indicate fraud.” *Ball v. McDowell* (*In re McDowell*), 162 B.R. 136, 140 (Bankr. N.D. Ohio 1993).

As discussed previously, Barnhill did not present any proof that Neill engaged in any fraudulent behavior at any time or that he sold more sod than Neill’s records indicate. Neill entered into a contract with Barnhill, agreed to deposit 70% of the sod sales into the escrow account and, due to financial difficulties, failed to do so. Neill was forthcoming at the trial in providing the Court with a list of the sales he made but for which he was unable to make the 70% deposits. Neill’s list showed \$11,583.75 in sod sales between June 27, 2002, and September 10, 2002. Had he remitted the 70%, he would have deposited \$8108.62 into the escrow account. Neill testified that he intended to deposit this amount of money when the contract closed; however, because he was unable to obtain financing, the sales agreements terminated without closing.

Turning to Barnhill’s fiduciary argument, the Sixth Circuit “has defined ‘defalcation’ to encompass embezzlement and misappropriation by a fiduciary, as well as the ‘failure to properly account for such funds.’” *Commonwealth Land Title Co. v. Blaszak* (*In re Blaszak*), 397 F.3d 386, 390 (6th Cir 2005) (citing *Capital Indemnity Corp. v. Interstate Agency, Inc.* (*In re Interstate Agency*), 760 F.2d 121, 125 (6th Cir. 1985)). A creditor seeking to except a debt under this provision must prove his allegations by a preponderance of the evidence. *Grogan*, 498 U.S. at 291. To succeed on his § 523(a)(4) complaint, a creditor must present evidence of “(1) a pre-existing fiduciary relationship; (2) breach of that fiduciary relationship; and (3) a resulting loss.” *Blaszack*, 397 F.3d at 90.

For purposes of § 523(a)(4), the determination of whether or not a fiduciary relationship existed is determined by looking to federal, not state, law. *Carlisle Cashway, Inc. v. Johnson* (*In re Johnson*), 691 F.2d 249, 251 (6th Cir. 1982). “[I]n addition to the existence of a fiduciary relationship, the debtor prior to the time of the alleged injury, must have held the funds at issue in a trust for the benefit of a third party.” *In re Grim*, 293 B.R. 156, 166 (Bankr. N.D. Ohio 2003). Section 523(a)(4) only applies to express or technical trusts which existed at the time the debt was created. It does not extend to “a trust which the law implies from a contract or from an event of wrongdoing – i.e., a constructive trust. *Id.* In order to prove the existence of an express or technical trust, a creditor must prove the existence of (1) an intent to create a trust; (2) a trustee; (3) a trust res; and (4) a definite beneficiary.” *Blaszack*, 397 F.3d at 391.

In the case at bar, Barnhill did not prove, or even allege, the existence of any of the required four factors. Nothing in the contracts indicated any type of an intent to create a trust, establish a trustee or name a beneficiary. There was no trust created in this case and, as such, Neill was not a fiduciary within the purview

of § 523(a)(4). As a result, Barnhill is not entitled to a non-dischargeable judgment against the debtor under this section.

D. 11 U.S.C. §§ 727(a)(2), 727(a)(3) and 727(a)(4)(A)

In addition to alleging that the debt Neill owes him is non-dischargeable under § 523(a)(2) and (4), Barnhill has also alleged that the Court should deny Neill an entire discharge of all his debts under three separate sections of 11 U.S.C. § 727. Barnhill first alleges that by selling the sod and not depositing the 70% in the escrow account Neill, with the intent to hinder, delay or defraud Barnhill, transferred property in violation of § 727(a)(2)(A). Barnhill presented no proof that Neill did anything other than sell sod and not remit the requisite 70% to the escrow account. Barnhill did not have any evidence that Neill did this fraudulently or that Neill possessed an intent to hinder, delay or defraud him when doing this. Neill’s uncontroverted testimony established that he was not able to deposit the money at the time of the sales due to his financial condition, but that he had every intention of depositing the money once the contracts closed and he received some of his earnest money back.

Barnhill also alleged that Neill failed to keep accurate business records and papers in violation of § 727(a)(3). Barnhill asserted that he requested a copy of Neill’s tax return from him and did not receive it. Based on this, Barnhill concluded that Neill did not file the tax return in question; however, Barnhill did not present any proof that Neill was delinquent in filing tax forms. Aside from this assertion, Barnhill did not clarify to the Court what business records or papers Neill had concealed, destroyed, mutilated, falsified or failed to keep in violation of this section. Neill presented the Court with a detailed list of the sod sales at issue which included the buyers’ names, the amount of money and the date of the sale. Although this list is not particularly sophisticated, the Court has no reason to believe that Neill’s list is not sufficient.

Barnhill’s last allegation under this section was that the debtor made a false oath or account by not listing his sod business on his petition. As with § 523(a)(2) and (4), this section requires a showing that the debtor possessed a fraudulent intent when omitting something from his petition. *In re Keeney*, 227 F.3d 679, 685 (6th Cir. 2000). A debtor’s omission must result in a material representation that the debtor knows to be false or that the debtor knows “will create an erroneous impression.” *Id.* A debtor is entitled to a discharge, however, if his omission is the result of mistake or inadvertence. *Id.* Barnhill did not present any proof that Neill intentionally failed to list the sod business on his petition. At most, it seems that Neill mistakenly omitted the sod business from his petition.

E. Conclusion

Although the Court can understand Barnhill’s frustration with Neill’s failure to deposit the requisite 70% of sod sales into the escrow account, the Court cannot find that this failure is grounds for a non-dischargeable judgment against the debtor or for a denial of discharge to Neill. All of the sections Barnhill has proceeded under require concrete proof of wrong-doing on the part of the debtor. While it is true that Neill had an obligation to deposit these monies in the escrow account pursuant to the two sales agreements, there was simply no proof presented to the Court that Neill fraudulently or in bad faith failed to remit the money. Barnhill also failed to present any proof that Neill damaged his equipment or property in any way that would entitle him to any type of a judgment against the debtor.

It appears that what occurred in this case was that Neill entered into the contracts with the full intention of obtaining financing and purchasing the sod farms. As time went by, however, Neill discovered that his financial future was not as bright as he expected and he ended up breaching the contracts. In accordance with the terms of the contracts, all of the monies in the escrow account were divided between Barnhill and the real estate company and Neill vacated the farms. Barnhill received \$73,107.00 as a result of this breach as well as getting possession of his farms back. He has since sold those farms to third parties for presumably close to what Neill was prepared to pay for the farms, \$1,700,000.00. Compared to these amounts, the \$8,108.62 Neill failed to deposit is a minimal sum.

III. ORDER

It is therefore **ORDERED** that the Plaintiff’s Complaint Objecting to Dischargeability is **DENIED**. Neill’s entire debt owing to Barnhill is **DISCHARGED**.

Service List

James Barnhill, Pro Se Plaintiff
Michael Tabor, Attorney for Debtor