UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

JOHN FRANKLIN COPPER,
Debtor.

Case No. 02-23450-L
Chapter 7

ATHENA CHEN COPPER and the
ESTATE OF SUMIKO YAMAOKA,
Plaintiffs,

v.

Adv. Proc. No. 02-0610

JOHN FRANKLIN COPPER
Defendant.

MEMORANDUM OPINION

This Adversary Proceeding came on for trial, without a jury, on September 22-23, 2003, upon the Complaint to Object to Discharge and to Determine Dischargeability of Debt filed by the Plaintiff, Athena Chen Copper, on behalf of herself and on behalf of the estate of Sumiko Yamaoka, on July 17, 2002. The Defendant-Debtor, John Franklin Copper, is the former husband of the plaintiff. The complaint alleges that the Debtor has filed a series of six bankruptcy cases in an attempt to avoid paying a judgment awarded to the Plaintiff and her mother, Sumiko Yamaoka, in connection with the divorce of the parties; that the Debtor's past conduct amounts to an abuse of process; that the pending Chapter 7 petition was filed in bad faith; and that the judgments awarded to the Plaintiff are nondischargeable pursuant to 11 U.S.C. sections 523(a)(5), (6) and/or (15). On the eve of trial, the Debtor filed a motion to convert his Chapter 7 case to Chapter 13. The court did not immediately rule on this motion, but indicated that it would rule on the motion after hearing the proof at trial. For the

following reasons, the court concludes the Debtor is not entitled to discharge pursuant to 11 U.S.C. § 727(a)(4)(A) and that the motion to convert to Chapter 13 should be denied. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(a) and 1334. This is a core proceeding. 28 U.S.C. § 157(b)(2)((I) and (J).

I. FINDINGS OF FACT

The Debtor is the Stanley J. Buckman Distinguished Professor of International Studies at Rhodes College in Memphis, Tennessee, a post he has held since 1984. He is a world-renowned expert on China and Taiwan, has authored some 25 books on Asian affairs, and travels to Taipei frequently as the guest of various educational and governmental agencies. The Debtor testified that his gross salary for the current year is $89,000. In addition, he receives income from various activities such as teaching, lecturing and writing.

The Debtor and Mrs. Copper were married in 1967 and divorced October 15, 1993. They have three grown children. The Final Decree of Divorce awarded Mrs. Copper $2,000 per month in alimony *in futuro*; one-half of the Debtor's interest in the Valic Rhodes College Tax-Deferred Annuity Plan; and all of the Debtor's interest in two annuity contracts held in the Teachers Insurance and Annuity Association-College Retirement Equities Fund ("TIAA/CREF"). In addition, the Debtor was ordered to pay to Mrs. Copper's parents the sum of $70,657.60, representing sums found to be taken

from Mrs. Copper's parents and interest accrued on those amounts. In his Memorandum Opinion, the trial judge made the following observation:

> Extensive proof was taken over a two week trial, most of which had to do with the property owned by the parties and the extent to which the defendant [the Debtor] had infringed upon the marital property by secreting accounts in banks and other places and not disclosing the amount of marital assets to the plaintiff. The testimony offered by the defendant was riddled by inconsistences to the extent that the Court is unable to believe any of the testimony offered by the defendant in his own behalf.

Trial Ex. 3. The Final Decree was affirmed in all respects by the Tennessee Court of Appeals and permission to appeal was denied by the Tennessee Supreme Court.

In February 1997, Mrs. Copper learned that the Debtor had converted the value of the TIAA/CREF accounts awarded to her, some $152,211.65, to his own use. The Debtor was found to be in civil contempt of court and ordered to return the misappropriated funds and to pay $3,100.00 to Mrs. Copper for attorneys' fees. In the course of undoing that transaction, Mrs. Copper discovered that an additional $3,278.93 awarded to her had been transferred to another account controlled by the Debtor. The filing of the Debtor's first Chapter 7 petition on August 7, 1997, prevented Mrs. Copper from seeking additional relief with respect to these funds.

In January of 1997, after no payments were made on any of the amounts awarded under the Final Decree of Divorce, Mrs. Copper caused a garnishment to be issued directed to Rhodes College seeking to collect the amounts owed to her from the Debtor's salary. The Debtor responded with a Motion to Set Installment Payments on Garnishment. This motion was granted, but the Debtor never

made any installment payments. Instead, on July 1, 1997, he filed a petition for relief under Chapter 11 of the Bankruptcy Code. The case was dismissed on July 23, 1997, upon the failure of the Debtor to timely complete the filing of documents.

The Debtor filed a second petition for relief under Chapter 7 of the Bankruptcy Code on August 12, 1997, a mere twenty days after the dismissal of the prior petition. That petition was dismissed by order entered September 29, 1998, when Chief Bankruptcy Judge David S. Kennedy refused to exercise jurisdiction over the case pursuant to 11 U.S.C. § 305(a)(1), upon a finding that the case was "in essence, a two-party dispute." Twenty-two months elapsed between the dismissal of this case and the filing of the Debtor's next bankruptcy petition. No payments were made to Mrs. Copper during this time. During that time, Mrs. Copper again sought payment through garnishment of the Debtor's salary; the Debtor filed a motion to set installment payments, and in connection with these proceedings, made the claim that his debts to Mrs. Copper had been discharged in bankruptcy. It was discovered that the bankruptcy court had inadvertently entered an Order Granting Discharge on September 11, 1998, which was promptly set aside when brought to the attention of the bankruptcy judge.

On July 12, 2000, in the face of a hearing on the Debtor's motion to set installment payments, the Debtor filed a third petition for relief, this one under Chapter 7 of the Bankruptcy Code. That case was dismissed on August 25, 2000, when the Debtor failed to appear for the meeting of creditors. Mrs. Copper again attempted to dispose of the motion to set installment payments, but before the motion

could be heard, the Debtor filed another Chapter 7 petition on December 6, 2000. This case was also dismissed on February 15, 2001, when the Debtor failed to attend the meeting of creditors.

After the dismissal of the fourth bankruptcy case, Mrs. Copper was successful in getting a hearing on the Debtor's motion to set installment payments. The motion was denied and the garnishment reinstituted on September 28, 2001. The Debtor responded with a fifth Chapter 7 petition, filed November 8, 2001. Although the Debtor obtained an extension of time to file the required documents to complete this filing, the case was nevertheless dismissed on January 8, 2001, when the Debtor failed to do so. On January 17, 2002, Mrs. Copper caused the garnishment to be reissued and the Debtor filed a sixth petition for relief. In this case, all required documents were filed with the petition and the Debtor did appear for the meeting of creditors. Although, Mrs. Copper sought the dismissal of the case with prejudice, the court denied the motion in order to permit the merits of the dispute to be heard in connection with the pending Adversary Proceeding.

At trial, the Court heard testimony from Mrs. Copper and the Debtor. In the course of trial, the Court discovered a number of serious false statements in the schedules and statement of financial affairs filed by the Debtor in this case. In order to highlight these false statements, the following comparison of the Final Decree of Divorce, dated October 15, 1993, and the Debtor's Schedules and Statement of Financial Affairs, dated February 25, 2002, is provided.

- In the Final Decree of Divorce, the Debtor was awarded the following from the marital property:

a. A house and lot known as 5910 Haymarket, Memphis, Tennessee, valued net of mortgages at $78,500.00;

b. A savings account in Taipei, Taiwan, value unknown;

c. An account at Riggs National Bank, value unknown;

d. An account at Enterprise National Bank valued at $1,000.00;

e. An account at Teacher's Credit Union valued at $210.00;

f. Davidson County General Obligation Bonds valued at $4,000.00;

g. U.S. Savings Bonds valued at $42,534.00;

h. An IRA at Home Federal Savings and Loan valued at $7,005.85;

i. An Acura Legend automobile valued at $12,000.00;

j. Chinese Ching Dynasty Emperor Robes valued at $20,000.00;

k. Coin Collections valued at $3,800.00;

l. Furniture and office equipment valued at $5,000.00.

- In addition, the Debtor owned as separate property, the following:

  a. Executive Life Insurance Policy in the face amount of $12,500.00 (single premium annuity); and

  b. Dean Witter fund in the amount of $10,000.00.

- In the Final Decree of Divorce, the Debtor was awarded one-half of the value of his Valic Tax-Deferred Annuity Plan, which at August 3, 1993, had a value of $42,609.90. In addition, the

Debtor was awarded the total accumulations under a TIAA SRA contract and a CREF SRA contract, together valued at $51,986.10.

- Taken together, the Debtor appears to have been awarded property of a value not less than $291,145.85.
- The Debtor's Schedule A lists no real property.
- The Debtor's Schedule B lists the following personal property:
    a. Available cash of $30.00;
    b. Household goods and personal items of $2,000.00;
    c. Clothes and personal items of $300.00;
    d. Retirement account through employer of "unknown" value; and
    e. Wages due of $1,000.00.
- The Debtor claims to have total assets, both real and personal, of $3,330.00. It is to be recalled that during the nine years that have elapsed between the Final Decree and the filing of the present bankruptcy case, the Debtor has been continuously employed as a chaired professor at Rhodes College.
- The Debtor claimed that the home he occupies with his current wife is owned by her and that he has no knowledge of what funds were used to purchase it.
- The Debtor testified that he maintains two bank accounts, one in the United States and one in Singapore. Neither of these accounts was listed on Schedule B.

- The Debtor admitted that he remains in possession of a portion of the coin collections awarded to him, but these are not listed on Schedule B.
- The Debtor claimed that the ceremonial robes never belonged to him and that he had returned them to their owner.
- The Debtor claimed that he does not own a car, but admitted that he drives a 2002 Nissan purchased by his wife.
- The Debtor claimed that he was unable to ascertain the value of his retirement account because "the person that handles that was out of town." At trial, Mrs. Copper produced evidence that as of August 31, 2001, the value of the Debtor's Securian retirement account was $117,270.57. Trial Ex. 34. As of June 30, 2001, the value of the Debtor's Rhodes College Tax-Deferred Annuity Plan was $139,504.57. Trial Ex. 35. Both of the exhibits relied upon by Mrs. Copper appear to be copies of statements provided to the Debtor.
- The Debtor's Schedule F lists liabilities of $234,417.01. The largest debts listed are $200,000 owed to Mimi Phillips, Mrs. Copper's attorney, which actually appears to be the debt owed to Mrs. Copper; $8,700.00 owed to David Caywood, an attorney; and $15,000.00 owed to Wanda B. Shea, also an attorney. The Debtor admitted in his answer that the debts to Caywood and Shea are not owed. Both Caywood and Shea submitted affidavits indicating that these debts were compromised and paid on July 19, 1996.

- At Schedule I, the Debtor listed monthly gross income of $5,979.16. This would yield an annual gross income of $71,749.92, if the Debtor is paid over twelve months, or $59,791.60 if the Debtor is paid over ten months. Either way, the amount of gross income reported is substantially below the $89,000 figure the Debtor gave at trial.
- The Debtor lists payroll deductions, excluding his $2,000 per month alimony obligation, of $2,333.38, or 39% of his gross pay. No paycheck stub was offered into evidence to account for these deductions.
- The Debtor fails to list any business income from his speaking and writing activities. At trial, the Debtor admitted that he has such income, but claimed that it was offset by expenses.
- At Schedule I, the Debtor claims that he is divorced. At trial, he admitted that he has been continuously married since 1995.
- At Schedule I, the Debtor lists no income for his current spouse. At trial, the Debtor testified that his wife earns $40,000 per year.
- At Schedule I, the Debtor claimed to have net monthly income of $1,645.78. At Schedule J, the Debtor claimed to have monthly expenses of $2,035.00. The expenses that he lists include $900 in rent or mortgage payments, $300 in utilities, and $100 in telephone expenses. The Debtor testified that he does not own a home. Schedule J also lists automobile insurance expense of $60. The Debtor testified that he does not own a car. The Debtor has listed expenses owed by his wife, but not her income.

The Debtor gave several explanations for the false statements and inconsistencies in his bankruptcy papers and testimony. He claimed that he had suffered a brain injury in August of 2001 that made it difficult for him to remember things. He claimed that he was unsure of the specific amounts of his debts because his young son had recently caused all of his bills to fall into a trash can and they had been thrown away. He claimed that he has problems with his eyes that make it difficult for him to read, so that he relied on the assistance of his attorney to complete his bankruptcy papers.

The Court found the Debtor to be a very difficult witness. He refused, for example, to acknowledge the authenticity of his signature on his bankruptcy petition or on a Consent Order entered in the state court dealing with the payment of Caywood and Shea, claiming that the signatures could have been stamped. He claimed that he does not know what Chapter 7 is, even though he has filed five Chapter 7 petitions. At times the Debtor seemed to be calculating the likelihood that his statements could be verified. At other times he seemed to be inventing excuses and explanations on the spot. The Debtor seemed to have virtually no appreciation or respect for the gravity of the proceedings initiated by him in the Bankruptcy Court. Given the very high level of the Debtor's education and stature within the educational and international communities, the Court found the Debtor's cavalier attitude and lack of candor to be surprising and offensive.

II. CONCLUSIONS OF LAW

The Plaintiff asserts that the discharge of the Debtor should be denied pursuant to 11 U.S.C. § 727(a)(4)(A). That section prevents a debtor from obtaining a discharge if he has knowingly or fraudulently, in or in connection with the case, made a false oath or account or presented or used a false claim. If the Debtor's discharge is to be denied pursuant to this section, the Plaintiff must prove the following by a preponderance f the evidence:

a. The making of a statement

b. under oath,

c. that is false,

d. that the Debtor knew to be false,

e. that is material, and

f. that is fraudulent.

See Keeney v. Smith (In re Keeney), 227 F.3d 679, 685 (6th Cir. 2000) and cases cited therein.

In connection with the filing of his bankruptcy schedules, the Debtor made the statements (1) that he had read the summary and schedules, and (2) that they were true and correct to the best of his knowledge, information, and belief. *See* Declaration Concerning Debtor's Schedules - Declaration Under Penalty of Perjury By Individual Debtor, dated February 25, 2002, signed by the Debtor. The statements were made under oath. The United States Code provides that in federal proceedings, an unsworn declaration under penalty of perjury is a permissible substitute for, and has the same force and effect as, a verification under oath. 28 U.S.C. § 1746. Thus, section 727(a)(4)(A) should be read

to include unsworn declarations under perjury. *See Hunter v. Shoup (In re Shoup),* 214 B.R. 166, 176 (Bankr. N.D. Ohio, 1997).

Both of the statements were false. The Debtor testified that the had not read his schedules or had them read to him. Further, as outlined above, the schedules were not true and correct. They contained a number of omissions and false statements. The Debtor failed to list assets, failed to list income, and listed claims that were not owing. The Debtor claimed to be divorced when he is in fact married. The Debtor included his wife's expenses, but not her income in his schedules, thereby distorting the amount of income available to him to pay creditors.

The statements were known to be false when they were made. The Debtor knew that he had not read his schedules and the Debtor knew that they were not accurate. The Court is not impressed with the Debtor's claim that an eye impairment prevented him from reading his schedules. The Debtor makes his living as a researcher, writer and speaker. He constantly relies upon his vision in his daily activities, and he is certainly more than capable of reading the twelve pages that comprise his summary and schedules. The correct information was within Debtor's knowledge at the time the statements were made. He knew that he had bank accounts and a coin collection; he knew that he had substantial assets in his retirement account; he knew that he no longer owed a debt to Caywood or Shea; he knew that he was married; he knew that his wife had income. Even the most cursory of glances over the schedules should have revealed these misstatements.

The statements were material. The subject of a false oath is material if it "'bears a relationship to the bankruptcy's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.'" *Keeney*, 227 F.3d at 686 citing *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174,178 (5th Cir. 1982). Each of the misstatements made by the Debtor fits within this description. While any one of the misstatements, taken alone, might not rise to the level of materiality, there is no question that the schedules as a whole give a false impression of the Debtor's financial condition. The Debtor understated assets, overstated debts, understated income, and overstated expenses.

The statements were fraudulent. The false statements made in connection with the Debtor's bankruptcy case are part of his continuing pattern of efforts to thwart Mrs. Copper in her endeavor to be paid the amounts owed to her. The purpose of section 727(a)(4)(A) is clear:

> [It is] to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to ensure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction . . . . "[t]he successful functioning of the bankruptcy act hinges both upon the bankrupt's veracity and his willingness to make a full disclosure."

Boroff v. Tully (In re Tully), 818 F.2d 106, 110 (1st Cir. 1987) (internal citation omitted). The statements made by the Debtor were false and were relied upon, for example, by the case trustee, in reporting this as a "no-asset" case. They were relied upon by the United States Trustee in determining whether to recommend dismissal of the case for "substantial abuse" pursuant to 11 U.S.C. § 707(b).

The Debtor wants the Court to believe that he was simply careless in the preparation of his schedules, but the facts betray a pattern of reckless indifference to the truth, which is itself sufficient to establish fraud. *See Keeney*, 227 F.3d at 686.

On the very day of trial, the Debtor attempted to correct one of the misstatements in his schedules. He submitted am Amendment to Petition and Schedules on September 22, 2003, that admits that there is no debt owing to Caywood and Shea. Amendment at this late date, coupled with the Debtor's failure to correct the other serious misstatements in his schedules, is insufficient to remove the taint of fraud. *See Phillips v. Phillips (In re Phillips)*, 187 B.R. 363, 372 (Bankr. M.D. Fla. 1995).

It has been said that, "Discharge under the Bankruptcy Code . . . is a privilege, not a right, and may only be granted to the honest debtor." *Kavanaugh v. Leija (In re Leija)*, 270 B.R. 497, 501 (Bankr. E.D. Calif. 2001) (citations omitted). While the denial of discharge is a harsh remedy, it is clearly the appropriate remedy in this case in which the Debtor has exhibited a continued pattern of abuse and reckless disregard for the truth of the statements contained in his schedules.

From all of this, the Court concludes that the Plaintiff has carried her burden of proof and has demonstrated that discharge of the Debtor should be **DENIED** pursuant to section 727(a)(4). As a result, the Court need not consider the balance of the Plaintiff's arguments. Discharge will be denied for all debts arising before the commencement of the Debtor's bankruptcy case. The effect of the denial of the Debtor's discharge is to forever prevent these debts from being discharged under sections

727, 1141, 1228(a), 1228(b), or 1328(b). 11 U.S.C. § 523(a)(10). *See Rakozy v. Crasper (In re Crasper),*142 B.R. 396 (Bankr. D. Idaho, 1992) (denial of discharge in bankruptcy is *res judicata*). The only remaining possibility for discharge of these debts is the "super-discharge" of 11 U.S.C. § 1328(a).

The Court thus turns to consideration of the Debtor's motion to convert this case to Chapter 13. The motion was filed the Friday before trial commenced on Monday, some seventeen months after the filing of the Chapter 7 petition. The Court does not believe that the Debtor has had a sudden change of heart and now wants to repay Mrs. Copper. To the contrary, his testimony at trial indicates that he never intends to repay her unless forced to do so. The Court believes that the Debtor and his counsel wanted to avoid the determination of the dischargeability of these debts and the entitlement of the Debtor to a discharge. The Debtor may also have hoped to obtain a discharge of his obligations by paying less than the full amount owed. The Debtor will not be permitted to manipulate the Bankruptcy Code in this manner.

In order for a Chapter 13 plan to be confirmed, a bankruptcy court must find that the plan has been proposed in good faith. 11 U.S.C. § 1325(a)(3). Generally, good faith is measured in terms of whether the plan proposes to devote all of a debtor's disposable income to payments under the plan for a period of 36 months. 11 U.S.C. § 1322(b)(1)(B). But the term good faith must encompass more than this simple test. The pattern of abuse exhibited by the Debtor over the past nine years leaves little room for doubt that the Debtor's proposal was not made in good faith. The Court believes that the

Debtor has always had the ability to repay the obligations owed to Mrs. Copper, even though the misstatements in the Debtor's schedules I and J give the impression that the Debtor has no disposable income. Further, the Court has little confidence that any schedules the Debtor would file in connection with a converted case could be relied upon to determine whether the Debtor's plan meets the best interest of creditors' test or whether the Debtor has proposed to devote all of his disposable income to his repayment plan. Finally, it is significant that no other creditors have appeared in any of the proceedings in the bankruptcy case. The Court suspects that in fact there are no other creditors, but that the Debtor repaid some or all of the claims listed long ago. In any event, the balance of the remaining claims is insignificant when compared with the claim of Mrs. Copper. Thus, a Chapter 13 plan for this Debtor would be little different than the installment payment plans he has sought and obtained in another court but failed to honor. From all of this, the Court finds and concludes that the motion to convert this case to Chapter 13 must be **DENIED** because it is not brought in good faith.

The Court will enter appropriate orders consistent with this opinion.

BY THE COURT

_____
JENNIE D. LATTA
United States Bankruptcy Judge

Date:_____

cc: Debtor/Defendant
Debtor/Defendant's Attorney
Plaintiff

Plaintiff's Attorney
United States Trustee
Case Trustee (if any)