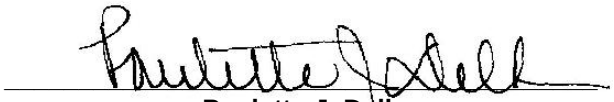
Dated: March 07, 2018
The following is SO ORDERED:



Paulette J. Delk
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

IN RE:

THOMAS W. HART, **Case No. 14-22272-PJD**

Debtor. **Chapter 7**

THOMAS W. HART,

Plaintiff/Counter-Defendant,

vs. **Adv. No. 15-00267**

THOMAS W. TAYLOR, LUCY TAYLOR YOUNG,

THOMAS W. TAYLOR REVOCABLE LIVING TRUST, and LT, INC.,

Defendants/Counter-Plaintiffs.

MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS/COUNTER-PLAINTIFFS' COUNTERCLAIM AND DISMISSING ADVERSARY PROCEEDING

This matter is before the Court on the Defendants/Counter-Plaintiffs' Counterclaim seeking revocation of the Debtor's discharge based on fraud. Based on the testimony, arguments of counsel, and the entire record in this cause, the Court finds that the Counterclaim should be denied. The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

FACTUAL SUMMARY

The dispute between the parties began with a state court lawsuit in which Defendants/Counter-Plaintiffs Thomas W. Taylor, Lucy Taylor Young, Thomas W. Taylor Revocable Living Trust and LT, Inc. ("Creditors") sued the Debtor and others on a guaranty. Creditors were awarded a judgment in the amount of $518,724.82, which they duly recorded.

Creditors then petitioned in state court for a charging order or sale at public auction of the Debtor's partnership and membership interests in Debtor's business entities[1]. Before the petition

[1] Schedule B of the Debtor's Chapter 7 bankruptcy petition lists his business interests in the following entities: (1)GH Holdings, LLC; (2) Hart Management, LLC; (3) MPT Holdings, LLC ;(4) Magnolia Square Partners, LLC ; (5) REM Family, LLC ; (6) FQ, LLC ; (7)Hart

was heard, the Debtor filed for relief under Chapter 7 of the Bankruptcy Code, thereby staying the state court proceeding. On July 1, 2015, the bankruptcy court entered an order granting the Creditors' motion to abandon the Debtor's interests in the business entities and lifted the stay so that the state court action could proceed. *See* 11 U.S.C. §§ 554(b) and 362(d). Once abandoned, the bankruptcy estate's interests in the Debtor's business entities accordingly reverted back to the Debtor pursuant to Bankruptcy Code § 554(c). There was no request for the Court to order otherwise. There was no objection to discharge.

On July 20, 2015, the Creditors filed an amended petition in state court, still seeking a charging order or sale of the Debtor's interests in the Debtor's business entities. However, on August 3, 2015, prior to any resolution of the state court proceeding, the Debtor received his Chapter 7 discharge in bankruptcy. Among the debts discharged was the Debtor's indebtedness to the Creditors pursuant to the state court judgment. Prior to the Debtor's discharge, the Creditors filed no motion to stay the discharge, nor any other pleading that would delay discharge of the prepetition judgment debt.

The Debtor then filed this adversary proceeding on August 13, 2015 to determine the validity, priority and extent of the judgment lien, since the underlying debt was discharged. Essentially, the Debtor asserts that the judgment lien is now void, and any further effort to collect on the judgment is a violation of the discharge injunction under § 524(a)(2) of the Bankruptcy

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Family Limited Partnership ; (8) Hometown Properties ; (9) Collierville Business Center ; (10) Collierville Prime Properties, GP ; (11) Washington Square Partnership; (12) FunQuest Family Entertainment; (13) GH Main Street, LLC ; and (14) GH Realty LLC.

Code.[2]

Creditors contend that Debtor's discharge was obtained by fraudulent information regarding the value of the business interests abandoned by the Chapter 7 trustee, and accordingly filed this counterclaim seeking revocation of the Debtor's discharge as obtained through fraud, pursuant to Bankruptcy Code § 727(d)(1).[3]

In support of their counterclaim, Creditors allege that Debtor's sworn statements regarding the value of his business interests was a key factor in the trustee's decision whether to object to the motion to abandon the interests, and that the elements required for exception to discharge based on false oath under § 727(a)(4)(A) are met. More specifically, Creditors point to Debtor's testimony at his first Rule 2004 examination on June 14, 2014, when, asked about the fair market value of the property at issue, Debtor gave his opinion that "the equity is not there." (Motion for Summary Judgment Exh. 4, Montedonico Deposition pp. 22-23). Thereafter, at the hearing on Creditors' motion to lift the automatic stay, Debtor testified as to value, "I think it is substantially lower than the debt due to occupancy rates in some of the properties. Because that's what drives the value in commercial real estate." (Motion for Summary Judgment Exh. 7, Transcript of May 5, 2015

[2] The Court entered an Order in the bankruptcy case on September 28, 2015, granting in part and denying in part the Debtor's motion to enforce the discharge order, determining that the Taylor parties held a general unsecured claim that was discharged, and, nothwithstanding the Court's prior order lifting the automatic stay, the subsequent discharge injunction prevented the Creditors from pursuing the state court lawsuit. This Order was not appealed.

[3]The Debtor filed a motion for summary judgment, based on the premise that the Debtor's statements regarding value of his business interests did not constitute "false oaths" as required for exception to discharge under § 727(a)(4)(A), and that the statements were immaterial to the trustee's decision to abandon the business interests. The Court denied the motion, finding the existence of genuine issues of material fact.

hearing, pp. 19-20).

Creditors also point out that Debtor subsequently expressed in a conversation with his brother, Mr. Paul Hart, and his brother's attorney, Mr. Terry Cox, his confidence that new appraised values of the properties would materially exceed the amount of refinanced debt, and that he anticipated a positive cash flow in the future. He also stated that he did not tell the bankruptcy court that the properties had no value, rather the bankruptcy trustee told the Court that the properties had no value. (Affidavit of Paul Hart filed in support of Creditors' Objection to Motion for Summary Judgment).

With regard to the facts of this case, Debtor contends that after the bankruptcy petition was filed, the bankruptcy trustee and Creditors conducted a thorough, independent investigation of the Debtor's interest in all of his assets, which included multiple Rule 2004 examinations of the Debtor, review of the tax assessor records, consultation with real estate professionals, review of documents including, among other things, tax returns of the business entities, rent rolls, leases, and prior appraisals. (Counter-Defendant's Post Trial Brief, pg. 3). Debtor also points out that, in addition, Creditors Lucy Taylor Young and the Taylor Trust requested and received two extensions of the deadline for filing a complaint objecting to discharge in order to conduct an investigation into the grounds, if any, for filing such a complaint. (*Id.* at pgs. 4-5). No such complaint objecting to discharge was filed.

ISSUE

The issue presented is whether the Debtor's testimony regarding the value of his business interests constitute a false oath pursuant to 11 U.S.C. § 727(a)(4)(A) sufficient to satisfy a denial of the Chapter 7 discharge based on fraud as provided by § 727(d)(1).

DISCUSSION

A. Elements of Section 727(d)(1)

Creditors base their revocation argument on §727(d)(1), which provides for revocation of a bankruptcy discharge that was "obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge..."

The party seeking revocation bears the burden of proof by a preponderance of the evidence. *Buckeye Retirement Co. v. Heil*, 289 B.R.897, 903 (Bankr. E.D. Tenn. 2003)(citing *Miller v. Miller (In re Miller)*, 246 B.R. 559, 562 (Bankr. E.D. Tenn. 2000). Because a debtor's discharge is central to a Chapter 7 case, the revocation of that discharge is not undertaken lightly. In fact, it is viewed as an extraordinary remedy, and is "liberally construed in favor of the debtor and strictly construed against the party seeking revocation." *Heil* at 903(citations omitted).

To satisfy "the fraud of the debtor" requirement, Creditors in this case rely on Debtor's two sworn statements in which Debtor testified that his opinion was that there was no equity in the business entities, and on Debtor's statement made in a later conversation in which he said that in his opinion there was significant equity in the business entities.

In alleging that Creditors did not know of this fraud until after the discharge was granted, Creditors argue that whether or not one of the requesting creditors did his own research regarding the value of the business entities, and whether or not that creditor had a disagreement with Debtor about that value, were not facts which would have caused Creditors to know that Debtor had falsely stated his opinion.

Arguably, the fact that one of the creditors, who has an extensive background in real estate, early on had investigated Debtor's assets and had reviewed the tax assessor's values and believed

those values to be indicative of the actual market value which was much greater than the value expressed by Debtor, was put on notice that Debtor might actually hold a different opinion of the value from that expressed in his testimony. "[T[he burden is on the creditor to investigate diligently any **possibly** fraudulent conduct before discharge." *Mid-Tech Consulting , Inc. v. Swendra*, 938 F.2d 885,888 (8th Cir. 1991)(emphasis supplied)(citation omitted). In *Swendra* ,the Eighth Circuit added: "In seeking to revoke the discharge in a separate proceeding when the matter could have been handled before discharge in the original bankruptcy case, Mid-Tech has squandered the resources of the parties and of the courts." *Id.*

But even if Creditors did not know of the alleged fraud, they must prove by a preponderance of the evidence that Debtor obtained the discharge through fraud. Creditors must prove that but for the fraud, the discharge would not have been granted.

The types of fraud that would have resulted in the denial of Debtor's discharge are set forth in Bankruptcy Code §727(a). Creditors have cited §727(a)(4)(A) as the provision under which Debtor would have been denied the discharge had his alleged fraud been known at the time. That subsection, in its entirety, provides: "The court shall grant the debtor a discharge, unless the debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account."

The Sixth Circuit has discussed the elements that must be proved to successfully bring an action to deny a debtor a discharge under §727(a)(4)(A):

> In order to deny a debtor discharge under this section, a plaintiff must prove by a preponderance of the evidence that: 1) the debtor made a statement under oath; 2) the statement was false; 3) the debtor knew the statement was false; 4) the debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. *See Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992). Whether a debtor has made a false oath under section 727(a)(4)(A) is a question of fact. *See Williamson v.*

Firemen's Fund Ins. Co., 828 F. 2d 249, 251 (4th Cir. 1987).

Keeney v. Smith (In re Keeney), 227 F.3d 679, 685 (6th Cir. 2000). Would the alleged false oath--i.e., that Debtor falsely testified under oath about the value of the business entities at two 2004 examinations as evidenced by his inconsistent statement in the conversation with his brother and with Mr. Cox—be an independent basis for denial of discharge under §727(a)(4)(A)? In general, a statement regarding the value of property reflects nothing more than the declarant's personal opinion and, as such, would not support a finding of fraud. *In re Bowen*, 58 F.Supp 286, 295 (E.D. Pa. 1944)(collecting cases); *Mortg. Guar. Ins. Corp. v. Pascucci (In re Pascucci)*, 90 B.R. 438,444 (Bankr. C.D. Calif. 1988)(citation omitted); *Wisconics Eng'g, Inc.v. Fisher*, 466 N.E. 2d 745, 756 (Ind. Ct. App. 1984)(citations omitted). But this rule presupposes that such a statement does in fact represent the declarant's opinion.

> If [debtor] did not genuinely believe that the property in question was worth what she claimed it was worth, then she misrepresented her opinion. Since a critical issue in the context of a § 727(a)(4)(A) action is the debtor's honesty, . . . such a misrepresentation could constitute grounds for denial of her discharge, even if the estimate of value which purports to be her opinion should prove to be accurate.

United States v. Sumpter (In re Sumpter), 136 BR 690, 696 (Bankr. E.D. Mich. 1991)(internal citations omitted). Creditors cite the *Sumpter* case for its discussion of §727(a)(4)(A)'s focus on a debtor's honesty with regard to a debtor's misrepresentation of his/her opinion. While the *Sumpter* Court does find that a debtor's misrepresentation of his/her opinion may be actionable under §727(a)(4)(A), the court's actual holding makes Creditors' citation of the case inapposite.

The *Sumpter* Court agrees with Creditors that reliance on a debtor's opinion is not an element

of §727(d)(1) or §727(a)(4)(A). Creditors cite *In re Heil*, which cites the *Keeney* opinion in which the Sixth Circuit sets out the elements under §727(a)(4)(A). Reliance is not one of the elements for denial of discharge under that subsection nor is it an element for revocation of discharge under §727(d)(1).

In the *Sumpter* case, the proof presented to show that debtor made a false statement on her sworn schedules regarding the value of her principal residence, was a later sworn reaffirmation agreement in which the debtor agreed to repay her home mortgage at a much higher amount than the amount that she listed as the value of her home in the schedules. The court found that the contradictory statements could be explained by varying valuation standards. *Id.* at 698-699.

Additionally in that case, the debtor allegedly made inconsistent statements regarding the value of household furnishings. These inconsistent statements about the value of the household furnishings were presented as proof that the debtor had made a false oath. But the court found as follows:

> It is also entirely plausible that the statements made on Exhibits 3 and 4 relative to the household furnishings' value and the alleged lien on them in favor of the trust were false and that the statements in the bankruptcy documents were true...Thus I conclude that the government failed to prove by a preponderance of the evidence either that the schedules' valuation of the home or the furnishings were false....

Id. at 699. Likewise, in this case it is entirely plausible that the statements made by Debtor in the 2004 examinations were true, and the statement made by Debtor in the conversation with his brother and Mr. Cox was false and made to bolster his argument in favor of obtaining funds to refinance the loan. It is also plausible that both statements were truthful and not inconsistent. Debtor may have responded in the 2004 examinations to questions regarding the present value of

the business entities, especially to questions from the trustee whose interest would have been in the present value of the business entities, since the trustee would not have contemplated holding the property for an extended period of time. In the subsequent conversation with his brother and Mr. Cox, Debtor may have been giving his opinion as to the potential future value of the property, inasmuch as his discussion was one related to the possibility of refinancing. In either event, Creditors have failed to prove by a preponderance of the evidence that Debtor's sworn statements were false because Debtor actually held a different opinion of the value of the business entities.

Creditors allege that Debtor's true and honest opinion was that expressed to his brother Paul Hart and Paul's attorney, Terry Cox on December 28, 2015. Creditors' Reply Brief. But Creditors provide no evidence that would prove that the December 28, 2015 statement was the true statement.

Unlike in the *Sumpter* case, Debtor did not enter into an agreement to pay a greater amount, nor did Creditors present evidence to prove that both opinions related to present value as opposed to an attempt to refinance which may have related to future value.

Based on the testimony in the 2004 examinations in which Debtor was questioned by the trustee, it is clear that the trustee's interest and line of questions related to the present value of the business entities, because the trustee has a present duty to liquidate property of the estate that may be of present value. But the conversation with his brother and Mr. Cox focused on the possibility of refinancing, and Debtor's statement there may have related to the future value of the business entities.

The Court agrees with Creditors that the statements are material. A false oath is material if it "'bears a relationship to the bankrupts's business transactions or estate, or concerns the discovery

of assets, business dealings, or the existence and disposition of his property.'" *Beaubouef*, 966 F. 2d at 178 (citation omitted); *Keeney* at 227 F.3d at 686 (quoting *Beaubouef*). But Creditors must prove that a material statement made by Debtor under oath was false in order to satisfy the requirements for revocation of the discharge. Insufficient proof of a false statement renders further discussion of the remaining elements unnecessary.

CONCLUSION

Because Creditors did not prove by a preponderance of the evidence that Debtor made a false statement, Creditors have not met the requirements of §727(a)(4)(A) or of §727(d)(1). Accordingly, the discharge may not be revoked, because insufficient proof was presented that the discharge was obtained through the fraud of Debtor. The adversary proceeding will be dismissed. A separate order shall enter.