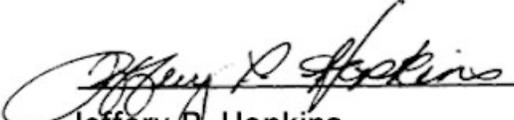


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IT IS SO ORDERED.

Dated: July 02, 2007


Jeffery D. Hopkins
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re :
:
DONALD V. YEAGER : Case No. 05-24818
: Chapter 7
: Judge Hopkins
Debtor :
_____ :
TUFFY ASSOCIATES CORP. : Adversary Case No. 06-1112
:
:
Plaintiff :
:
vs. :
:
DONALD V. YEAGER :
:
:
Defendant :
_____ :

MEMORANDUM ON ENTRY DENYING DISCHARGE

This matter was tried before the Court upon an evidentiary hearing. The Plaintiff, Tuffy Associates Corp. ("Tuffy"), seeks, under 11 U.S.C. § 727(a)(4)(A) and related subsections, to have the Debtor's discharge denied. After reviewing the entire record, the Court finds that Tuffy has sustained its burden of proof. The discharge sought in this case will be denied.

RELATIONSHIP OF THE PARTIES

Tuffy is a franchiser of automotive repair products and services. The Defendant, Donald Yeager ("Debtor"), became a Tuffy franchisee in 1997. The Debtor formed a corporation known as Automotive 1, Inc. ("Automotive") to operate a Tuffy Auto Service Center in Fairfield, Ohio. Shortly after Tuffy initiated eviction proceedings against the Debtor, he sought protection under chapter 7. The petition was filed on November 15, 2005.

ELEMENTS OF § 727(a)(4)(A)

To prevail under § 727(a)(4)(A) Tuffy must prove 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. *In re Keeney*, 227 F.3d 679, 685 (6th Cir. 2000).

ANALYSIS

1. Statement Under Oath

The debtor made no less than ten pre-trial statements that evince false testimony under oath. *See In re Hamo*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999)(statement in schedules is a "statement under oath"); *In re Babb*, 358 B.R. 343, 355 (Bankr. E.D. Tenn. 2006)(statement at Rule 2004 exam is a "statement under oath"). The several statements under oath that the Debtor made which have proven to be false and materially related the bankruptcy case are recounted below:

LOANS TO AUTOMOTIVE

According to the Debtor's testimony, he loaned more than \$100,000 to Automotive during the two-year period prior to the filing of his bankruptcy petition. Despite this assertion, the Debtor never disclosed on Schedule B that he made any loans to Automotive. Nor did the Debtor disclose the loans in response to Question 10 on his Statement of Financial Affairs, which asked him to "[l]ist all other property . . . transferred either absolutely or as security within two years immediately preceding the commencement of this case." The Debtor's silence to these questions in the face of an affirmative duty imposed by the Bankruptcy Code and Rules to state complete and truthful answers is tantamount to giving false testimony. *See* 11 U.S.C. §521(a)(1)(B)(iii); Interim Rule 1007(b)(1)(D).

GLENWOOD COURT TRANSACTION

It is undisputed that the Debtor sold his residence located at 25 Glenwood Court, Fairfield, Ohio, in February of 2005. The Debtor owned the property jointly with Cheryl Pepper. That sale generated net proceeds for the Debtor and Ms. Pepper in the amount of \$29,252.71.

Similar to before, Debtor did not disclose the Glenwood Court transfer in response to Question 10 on his Statement of Financial Affairs. Moreover, Debtor's later testimony about the disposition of the sale proceeds totally lacks credibility.

One of the closing agents knowledgeable about the transaction, Kym Sycks, testified that she issued a check jointly payable to the Debtor and Ms. Pepper. The Debtor testified that he endorsed the check and then mailed it to Ms. Pepper. In return, according to the Debtor, he received multiple checks from Ms. Pepper that represented his share of the proceeds. These statements completely contradict the Debtor's testimony at his March 27, 2006 Fed. R. Bankr. P. 2004 examination, where the following exchange occurred:

- Q: She [Ms. Pepper] cashed the check and sent the proceeds back to you?
A: Yes.
Q: And by mail?
A: Yes.
Q: Did you cash the check?

- A: Did I cash it? Yes, I did.
Q: Where did you cash it?
A: Where?
Q: Yes.
A: US Bank, I believe. Whatever bank it was drawn on.

Both accounts given by the Debtor are difficult to square with Kim Sycks' more credible testimony. Ms. Sycks, a completely unbiased witness in the case, testified that the check issued to the Debtor and Ms. Pepper has not been cashed and that her company still holds \$29,252.71 in escrow. That Ms. Pepper would write one or more checks to the Debtor if she never cashed the check that the Debtor allegedly mailed to her in the first place belies his entire testimony on the subject.

HENRY YOUNG

At a January 16, 2006 Rule 2004 examination, counsel for Tuffy inquired as to the whereabouts of certain equipment used at the Fairfield store. The Debtor testified that some of the equipment belonged to a man named Henry Young, who purchased the equipment by means of cashier's checks payable to various equipment vendors. The Debtor then offered to provide a list of the equipment owned by Mr. Young.

Subsequently, the Debtor provided a list of six pieces of equipment. The list contains a signature line for Mr. Young. A signature appears on that line. At a February 17, 2006 Rule 2004 exam, the Debtor testified that Mr. Young owned the equipment on the list; that Young had signed the list; and, that Young had removed the equipment from the Fairfield store in January of 2006.

Contrary to the Debtor's Rule 2004 testimony, Mr. Young testified, quite credibly at trial, that he has never owned any of the equipment on the list; that he never signed the list; that he never bought any equipment for the Tuffy Auto Service Center in Fairfield, Ohio, by means of cashier's checks or otherwise; and that he never removed equipment from the Fairfield store in January of 2006. Mr. Young further testified that the Debtor twice asked Young to claim that the equipment was his which Young has consistently refused to do.

Even with these inconsistencies, the Debtor also contradicted his own Rule 2004 testimony. At his February 17, 2006 Rule 2004 exam, the Debtor testified that

Mr. Young signed the list at the Debtor's house. At trial, the Debtor testified that Mr. Young signed the list at the Fairfield store.

Even if Mr. Young owned the equipment, the Debtor did not list the equipment in response to Question 14 on his Statement of Financial Affairs as he was required to do. Question 14 mandates that the Debtor "[l]ist all property owned by another person that the debtor holds or controls." This omission was material and was a violation of the Debtor's duties to respond truthfully on the Official Bankruptcy Forms, which were all signed under the penalty of perjury.

2. Statement Was False

Five of the Debtor's pre-trial statements were contradicted at trial by witnesses whose testimony was far more credible than his. Ms. Sycks testified that the Glenwood Court property was transferred in February of 2005. Mr. Young testified credibly that: he never owned any of the equipment on the list; that he never signed the list; that he never bought any equipment for the Tuffy Auto Service Center in Fairfield, Ohio, by means of cashier's checks; and that he never removed equipment from the Fairfield store in January of 2006. The Court finds that the pre-trial statements made by the Debtor under oath in connection with these events to be utterly without veracity.

The other five pre-trial statements (no loans to Automotive disclosed on Schedule B; no loans to Automotive listed in Statement of Financial Affairs; the Rule 2004 testimony that Debtor received one check from Ms. Pepper; the Rule 2004 testimony that Young signed the equipment list at Debtor's house; the lack of any statement in the Statement of Financial Affairs that lists any property of Mr. Young being held in custody of Debtor) were contradicted by the Debtor's own testimony at trial. Given the Debtor's propensity to fabricate testimony, the Court is unsure whether to believe his trial testimony, his pre-trial statements, or neither. Either way, the Debtor has falsely testified under oath.

3. Debtor Knew Statement Was False

"A statement is made with knowledge if it is known to the debtor to be false, or made without a belief in its truth, or made with a reckless disregard of its truth." *In re Downey*, 242 B.R. 5, 13 (Bankr. D. Idaho 1999).

At trial, the Debtor was asked if he knew that a couple of his pre-trial statements were false. The Debtor said he did not know they were false. However, based upon the totality of the circumstances, the Court finds that the Debtor knew that his statements were false. At the very least, they were made with a reckless disregard for the truth. The Court certainly finds it inconceivable that all ten false statements were made by mistake or inadvertence. *See Keeney*, 227 F.3d at 686 ("a debtor is entitled to discharge if false information is the result of mistake or inadvertence").

4. Debtor Made False Statement With Fraudulent Intent

Fraudulent intent may be inferred from circumstantial evidence or from the Debtor's course of conduct. *Hamo*, 233 B.R. at 724. A reckless disregard as to whether a representation is true will also satisfy the intent requirement. *Keeney*, 227 F.3d at 686. Debtor's conduct throughout these proceedings has been obstreperous and anything but honest and forthright. Accordingly, the Court finds that the Debtor made the false statements with fraudulent intent or, at the very least, with total reckless disregard for the truth.

5. Statement Related Materially To The Bankruptcy Case

The subject of a false oath is material if it bears a relationship to the Debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the Debtor's property. *Keeney*, 227 F.3d at 686; *Hamo*, 233 B.R. at 725. The false statements in this case related to the bankruptcy estate (the loans to Automotive), the Debtor's business dealings (the equipment used in the Fairfield store), and the disposition of the Debtor's property (the sale of the Glenwood Court residence). By virtue of these findings, the Court determines that these false statements were material to the bankruptcy case.

CONCLUSION

Based upon the foregoing, the Court concludes that the Debtor's discharge should be **DENIED** pursuant to 11 U.S.C. § 727(a)(4)(A). An entry to this effect will be docketed separately.

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