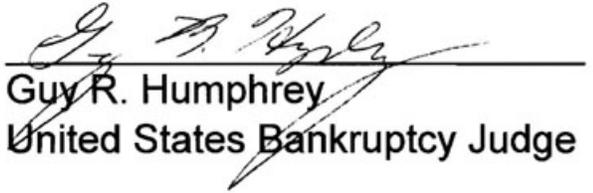


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IT IS SO ORDERED.




Guy R. Humphrey
United States Bankruptcy Judge

Dated: October 18, 2013

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: ORLANDO Y. CARTER,

Debtor

Case No. 06-30086

Adv. No. 08-3027

JOHN PAUL RIESER, CHAPTER 7 TRUSTEE,

Plaintiff

Judge Humphrey

Chapter 7

v.

ORLANDO Y. CARTER,

Defendant

Decision Denying Debtor's Chapter 7 Discharge

I. Background

On January 18, 2006 the debtor Orlando Carter filed a voluntary petition under Chapter 7 of the Bankruptcy Code (estate doc. 1). On May 7, 2008 Carter was indicted by a

grand jury on eleven counts in the United States District Court for the Southern District of Ohio (Plaintiff Exhibit A). Those counts were mail fraud [18 U.S.C. § 1341], conspiracy to commit mail and wire fraud [18 U.S.C. § 1349], bank fraud (five counts) [18 U.S.C. § 1344], conspiracy to commit bank fraud [18 U.S.C. § 1349], making false statements to the Small Business Administration [18 U.S.C. § 645(a)], bankruptcy fraud [18 U.S.C. § 157(1) & (2)], and false oaths to a bankruptcy trustee [18 U.S.C. § 152(2) & (3)]. Carter was found guilty on all eleven counts on June 9, 2010. The convictions were affirmed on appeal. *United States v. Carter*, 483 Fed. Appx. 70 (6th Cir. May 18, 2012), *cert. denied* 133 S. Ct. 677 (2012).

On February 4, 2008 the Chapter 7 Trustee, John Paul Rieser (the “Trustee”), filed a complaint against Carter objecting to his discharge pursuant to 11 U.S.C. § 727(a)(2), (3), (4) and (5) (doc. 1). Carter filed an answer on May 30, 2008 (doc. 10). The Trustee moved for summary judgment on July 22, 2013 under § 727(a)(2), (3) and (4) (doc. 39) and Carter responded, after an extension was granted, on September 23, 2013 (doc. 43).

II. Jurisdiction

This court has jurisdiction pursuant to 28 U.S.C. § 1334 and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J).

III. Summary Judgment Standard

The appropriate standard to be used by the court to address this motion for summary judgment is contained in Federal Rule of Civil Procedure 56(a) and incorporated in bankruptcy adversary proceedings by reference in Federal Rule of Bankruptcy Procedure 7056. Rule 56(a) states in part that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is

entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In order to prevail, the movant, if bearing the burden of persuasion at trial, must establish all elements of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). Thereafter, “the nonmoving party must come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986).

IV. Carter’s Criminal Conviction under 18 U.S.C. § 152(2) Has Preclusive Effect in Denying His Discharge Under § 727(a)(4)(A)

Carter was convicted of make a false oath to a bankruptcy trustee pursuant to 18 U.S.C. § 152(2) and (3). Section 152(2) and (3) provides that “[a] person who . . . (2) knowingly or fraudulently makes a false oath or account in or in relation to any case under title 11; (3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11 . . . shall be fined under this title, imprisoned not more than 5 years, or both.”

11 U.S.C. § 727(a)(4)(A) provides that “[t]he 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[.]” Carter’s conviction under 18 U.S.C. § 152(2) matches the elements for a denial of discharge for a false oath or account under § 727(a)(4)(A). Cf. *Gray v. Comm’r*, 708 F.2d 243, 247 (6th Cir. 1983) (a conviction for criminal tax evasion is claim preclusive for a claim for civil tax fraud because the elements are identical). Moreover, whereas denial of a discharge must be proven by a preponderance of the evidence, a criminal conviction requires the higher standard of proof of beyond a reasonable doubt.

Further, his conviction meets the four part test to be entitled to preclusive effect: “(1) precise issue raised in present case must have been raised and actually litigated in prior proceeding; (2) determination of issue must have been necessary to outcome of prior proceeding; (3) prior proceeding must have resulted in final judgment on the merits; and (4) party against whom estoppel is sought must have had full and fair opportunity to litigate issue in prior proceeding.” *United States Sec. and Exch. Comm’n v. Blackwell*, 477 F. Supp. 2d 891, 899-900 (S.D. Ohio 2007) (citing *Smith v. SEC*, 129 F.3d 356, 362 (6th Cir. 1997)). The record shows Carter was convicted after a trial on the precise issue of a false oath in bankruptcy and that the Sixth Circuit rejected all challenges to the conviction upon direct appeal. Therefore, his conviction is entitled to preclusive effect that Carter knowingly or fraudulently made a false oath or account.¹ The Trustee having proved the elements of § 727(a)(4)(A), a denial of Carter’s discharge is warranted.

Carter has responded to the Trustee’s motion, arguing that the court should deny the motion because he has a pending motion for a new trial asserting, among other things, his

¹ Carter was also convicted of bankruptcy fraud pursuant to 18 U.S.C. § 157(1) and (2). Section 157(1) and (2) provides that “[a] person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so— (1) files a petition under title 11, including a fraudulent involuntary petition under section 303 of such title; (2) files a document in a proceeding under title 11 . . . shall be fined under this title, imprisoned not more than 5 years, or both.” Although the elements of this count have similarities with § 727(a)(2) and (3), the summary judgment record may not be sufficient under § 727(a)(2) or 727(a)(3) because the elements do not appear to be the same. See 11 U.S.C. § 727(a)(2) (“the court shall grant the debtor a discharge, unless . . . the debtor, with intent to hinder, delay, or defraud a creditor or an 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 the filing of the petition; or (B) property of the estate, after the date of the filing of the petition.”); 11 U.S.C. § 727(a)(3) (“the court shall grant the debtor a discharge, unless . . . the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor’s financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case[.]”). Of course, the Trustee has no need to prove these other § 727 counts because the § 727(a)(4)(A) count is sufficient to deny Carter’s discharge and the court need not rule upon the balance of the Trustee’s dispositive motion.

“actual innocence” based upon “newly discovered evidence” (doc. 43). However, at the present, Carter’s conviction, affirmed upon direct appeal to the Sixth Circuit Court of Appeals, is entitled to preclusive effect. The filing of a motion alleging a new trial is warranted does not change the binding effect of that judgment in this proceeding.² See *Blackwell*, 477 F. Supp. 2d at 900-01 (citing *United States v. Jolivette*, 257 F.3d 581, 583 (6th Cir. 2001) (“A criminal conviction and sentence is a final judgment on the merits.”)).

Carter also argues he was not convicted of violating § 727 of the Bankruptcy Code and challenges specific assertions by the Trustee or the details of his trial. Regarding the latter point, this court’s decision granting summary judgment is not based on the particular details of his trial, the indictment or statements of the Trustee in his summary judgment motion. Rather, this decision is based upon the simple fact that Carter was convicted of having made a false oath in his bankruptcy case and the elements of that crime precisely match the elements necessary to deny his discharge under § 727. See also *Raiford v. Abney (In re Raiford)*, 695 F.2d 521, 522 (11th Cir. 1983) (“The conduct involved in section 727 is identical to that proscribed under 18 U.S.C.A. § 152.”). The entire point of preclusion principles is this court need not retry the same issues already fairly addressed by a competent tribunal. *Blackwell*, 477 F. Supp. 2d at 899 (citing *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951)). See also *Gardner v. United States*, 443 Fed. Appx. 70, at *79 (6th Cir. Sept. 30, 2011) (“collateral estoppel can be applied when the prior suit is criminal and the subsequent suit civil, as long as the issues presented are identical.”)).

² If Carter’s conviction under 18 U.S.C. § 152(2) is overturned, Carter could file a motion with this court to vacate the order denying his discharge. See Fed. R. Civ. P. 60(b) (applicable by Fed. R. Bankr. P. 9024).

V. Conclusion

For the foregoing reasons, the Chapter 7 Trustee is granted summary judgment and Carter is denied his discharge pursuant to § 727(a)(4)(A). The court is contemporaneously entering an order consistent with this decision.

Copies to:

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(Counsel for the Plaintiff)

Orlando Y. Carter, Registration Number 04727-061, Federal Medical Center, P.O. Box 14500, Lexington, KY 40512 (Debtor and Defendant)

Courtesy Copy to:

Shawn Mitchell, Case Manager, Federal Medical Center, 3301 Leestown Road, Lexington, KY 40511-8799

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