

727(a)(2)(A)
727(a)(4)(A)

In re Fitzsimmons Case No. 388-34645
Fitzsimmons v. Stokes BAP No. OR-91-1023 MeAsJ
9/3/91 BAP affirming J. Luckey unpublished

The bankruptcy court was not clearly erroneous in finding that the debtor's deposit of income into his wife's account constituted the transfer of assets with the intent to hinder, delay or defraud creditors under 727(a)(2). The debtor's failure to disclose five bank accounts and a prior bankruptcy case in his statement of affairs was a false oath which barred a discharge under 727(a)(4)(A). The omitted accounts were used for substantial deposits, and the omission was therefore material. The fact that the debtor ultimately disclosed the information at a 341(a) meeting after being confronted with the misstatements did not purge the false oath.

29(11)

(file with underlying opinion P90-
dated 9/10/90)

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SEP - 3 1991

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT
U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

SEP - 3 1991 ²⁰⁰¹ 10/3/91

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In re
JERRY C. FITZSIMMONS,
Debtor.

BAP No. OR-91-1023 MeAsJ
Bk. No. 388-34645-P7
Adv. No. 89-3139

JERRY C. FITZSIMMONS,
Appellant,
v.

MEMORANDUM

JOSEPH R. and S. PAULINE
STOKES, U.S. TRUSTEE and
Ronald A. Watson, Ch. 7
Trustee,
Appellees.

Argued and Submitted
June 18, 1991 in Portland, Oregon

Filed: SEP - 3 1991

Appeal from the United States Bankruptcy Court
for the District of Oregon

Hon. C.E. Luckey, Bankruptcy Judge, Presiding

Before: MEYERS, ASHLAND and JONES, Bankruptcy Judges

1 The debtor in this case appeals from the bankruptcy court's
2 order which denied him a discharge pursuant to 11 U.S.C. §§
3 727(a)(2)(A) and (a)(4)(A). We **AFFIRM**.
4

5
6 **I**

7 **FACTS**

8 Appellees Joseph R. and S. Pauline Stokes obtained a judgment
9 against Jerry G. Fitzsimmons ("Debtor"). After entry of this
10 judgment and upon the advice of Debtor's attorney, on June 29,
11 1988, Debtor's wife opened a new bank account in her name. From
12 June 29, 1988 through November 1, 1988, Debtor had his paychecks
13 deposited into her bank account.

14 On October 17, 1988, Debtor filed a petition for relief under
15 Chapter 13 of the Bankruptcy Code. The Chapter 13 filing was
16 converted to a Chapter 7 case on November 4, 1988 and the Debtor
17 filed his schedules and statement of affairs. Debtor listed only
18 two bank accounts in his statement of affairs. In fact, within two
19 years preceding his bankruptcy petition he had been an authorized
20 signer on at least five other bank accounts. The Debtor also
21 failed to disclose a prior Chapter 13 petition filed in 1980.

22 Appellees sought denial of the Debtor's discharge for the
23 alleged transfer of assets with intent to hinder, delay or defraud
24 creditors proscribed by 11 U.S.C. § 727(a)(2), arising out of
25 Debtor's acts of depositing his income into his wife's account.
26 Appellees also sought denial of discharge under Section 727(a)(4),
alleging that the Debtor knowingly and fraudulently made false

1 oaths and accounts by failing to disclose all of his assets and
2 bank accounts, by misrepresenting income which he received from
3 royalties and by failing to disclose a prior Chapter 13 proceeding.

4 After a three day trial, the court issued its order denying
5 the discharge on September 10, 1990. On November 28, 1990, the
6 trial court denied Debtor's motion to amend the judgment and grant
7 a new trial. Debtor filed his notice of appeal on December 7,
8 1990.

10 II

11 DISCUSSION

12 A decision to deny discharge should be disturbed only for a
13 gross abuse of discretion. A reviewing court must defer to the
14 bankruptcy court's decision to deny the discharge unless its
15 factual findings are clearly erroneous or it has applied the
16 incorrect legal standard. In re Cox, 904 F.2d 1399, 1401 (9th Cir.
17 1990).

18 Discharge was denied the Debtor under Bankruptcy Code Sections
19 727(a)(2)(A) and 727(a)(4)(A). Section 727(a)(2)(A) denies
20 discharge to Debtors who take actions intending to keep their
21 assets from their creditors either by hiding the assets until after
22 they obtain their discharge or by destroying them. In re Adeeb,
23 787 F.2d 1339, 1345 (9th Cir. 1986). Debtor claims that although
24 he transferred assets he never intended to defraud his creditors by
25 doing so.

26 The court's finding that the Debtor intended to defraud his

1 creditors is a finding of fact. Adeeb, supra, 787 F.2d at 1342.
2 We have reviewed the record in this case and hold that this finding
3 is not clearly erroneous.

4 Debtor claims that he lacked actual intent to hinder or delay
5 his creditors because he relied on the advice of his attorney.
6 Generally, a debtor who acts in reliance on the advice of counsel
7 lacks the intent required to deny discharge. However, the debtor's
8 reliance must be in good faith. Adeeb, supra, 787 F.2d at 1343; In
9 re Rice, 109 B.R. 405, 408 (E.Cal. 1989), aff'd 126 B.R. 822 (9th
10 Cir. BAP 1991)(Table).

11 The Debtor in the present case acted on counsel's suggestion
12 that the Debtor's wife should open a bank account to protect her
13 personal property from the Debtor's judgment creditors. Yet the
14 attorney never suggested transferring the Debtor's income to this
15 account. The bankruptcy court's finding that there was no factual
16 basis for the advice of counsel defense has not been shown to be
17 clearly erroneous. Further, even if the Debtor's attorney had
18 advised the Debtor to transfer his income to his wife's account in
19 order to hide his money from creditors, reliance on this advice
20 would be in bad faith and as such would not provide the Debtor a
21 safe harbor from the penalties of Section 727(a)(2)(A).

22 Debtor maintains that the amounts deposited in his wife's
23 checking account were minimal and never hidden from creditors.
24 This is simply untrue. Thousands of dollars were deposited in the
25 account, comprised of all of Debtor's biweekly paychecks between
26 June 29, 1988 and November 1, 1988. Moreover, even a small amount

1 of money fraudulently used may serve as the basis to deny a debtor
2 a discharge under Section 727(a)(2)(A). Matter of Ayala, 107 B.R.
3 271, 275 (E. Cal. 1989); In re Krich, 97 B.R. 919, 923 (N. Ill.
4 1988). There is also evidence that the transfers were hidden from
5 creditors. At the Section 341(a) hearing, the trustee asked Debtor
6 whether he had conveyed any interests to his wife. The Debtor
7 responded: "Not that I'm aware of. I don't remember conveying
8 anything to her."

9 Debtor also argues that Section 727(a)(4)(A) was applied
10 improperly. This section denies discharge to debtors who knowingly
11 and fraudulently make a false oath or account. The purpose of
12 Section 727(a)(4) is to ensure that dependable information is
13 supplied to those interested in the administration of the
14 bankruptcy estate so that they can rely upon it without the need
15 for the trustee or other interested parties to dig out these true
16 facts in examination or investigations. In re Aubrey, 111 B.R.
17 268, 274 (9th Cir. BAP 1990).

18 The bankruptcy court found that the Debtor knowingly and
19 fraudulently made false oaths in listing only two of the seven bank
20 accounts he held and in failing to list a 1980 bankruptcy filing in
21 his schedules and statement of affairs. The court found that the
22 Debtor, in signing his schedules and statements of affairs, did so
23 clearly knowing of the omissions, with the intent to provide only
24 a minimal basis for creditor scrutiny of his past transactions.
25 The Debtor has not shown this factual finding of intent to be
26 clearly erroneous.

1 The Debtor asserts he was only following his attorney's advice
2 to exclude from the schedules bank accounts of negligible value.
3 The bankruptcy court found this factual assertion to be unsupported
4 by the evidence and we see no clear error in this finding.

5 We also reject Debtor's argument that he should not be denied
6 the discharge because the evidence he omitted was eventually
7 disclosed. As the bankruptcy court noted, disclosure came only
8 when one of the bank representatives at the Section 341(a) meeting
9 confronted the Debtor with evidence of the omitted accounts.

10 Finally, the Debtor contends that he should not be denied a
11 discharge because his omissions were not material. We affirm the
12 bankruptcy court's determination that they were. The court held
13 that one of the omitted accounts was used for substantial deposits
14 of personal funds and disbursements for personal purposes.

15
16 III

17 CONCLUSION

18 The Debtor has failed to show that the bankruptcy court
19 committed a gross abuse of discretion when it denied Debtor's
20 discharge under Bankruptcy Code Sections 727(a)(2)(A) and
21 (a)(4)(A). Therefore the order denying discharge to Debtor is
22 **AFFIRMED.**

11 USC § 727(a)(2)
11 USC § 727(a)(4)
Burden of Proof
Bankr. R. 4005

Stokes v. Fitzsimmons Adv. No. 89-3139
In re Fitzsimmons Case No. 388-04645

9/10/90 CEL unpublished

The debtor intentionally omitted from his Statement of Affairs certain bank accounts containing funds of the debtor. The accounts, though not in the debtor's name, were used by the debtor for deposits and withdrawals. In addition, the debtor also failed to disclose a prior chapter 13 case which was dismissed without administration. The debtor also transferred money from a joint account to one in his wife's name for the purpose of hindering creditors.

In an action to deny a discharge, Rule 4005 imposes the burden of proof of all elements upon the creditor. The court, in denying the debtor's discharge under 11 USC §727(a)(2) and 727(a)(4), found that the creditor had met that burden by a preponderance of the evidence.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Case No. 388-04645-P7
JERRY C. FITZSIMMONS,)	
)	
Debtor.)	
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JOSEPH R. STOKES and)	Adversary No. 89-3139
S. PAULINE STOKES,)	
)	
Plaintiffs,)	
)	
v.)	NARRATIVE MEMORANDUM
)	OPINION
JERRY C. FITZSIMMONS,)	
)	
Defendant.)	

In this proceeding the plaintiffs seek to deny the debtor's discharge under 11 U.S.C. § 727(a)(2) and § 727(a)(4).

The debtor/defendant is college educated and has demonstrated above average earning capacity. He has from time to time had his own businesses.

The debtor earned and earns his living as a salesman of chemical products primarily used as pesticides and products related to their use in agriculture. During the period relevant

1 to these proceedings, he also had arrangements with manufacturing
2 and marketing companies entitling him to royalty payments based
3 on sales of products for which he had developed formulae, and
4 formed a corporation, Cloverleaf Products, to obtain and market a
5 pesticide which had been banned for use by government agencies,
6 but for which he learned there would be a limited removal of the
7 ban on the product which he knew to be much desired for use in
8 agriculture.

9 In the fall of 1984, the defendant learned that the
10 plaintiffs, Joseph R. and S. Pauline Stokes, were selling a pizza
11 parlor. The debtor had a son-in-law who was qualified in the
12 restaurant and retail businesses. The defendant decided to buy
13 the business, contemplated that he would, in turn, sell it to his
14 son-in-law.

15 The defendant purchased the business in October, 1984.
16 The contract price for the land and pizza parlor was \$285,000.
17 The realty and rest of the business were sold by separate
18 contracts. The real property was subject to an encumbrance to
19 First Interstate Bank, as a successor bank. The contract of sale
20 relating to the realty provided for the \$200,000 to be paid by
21 buyer's assumption of a first mortgage balance of \$97,067.24 and
22 a second mortgage balance of \$29,582.74 with a balance of \$73,000
23 payable in installments of \$704.43 per month and other payment
24 provisions.

25 The sale of the pizza parlor was for \$85,000, with
26 \$45,000 apportioned to the fixtures and equipment, \$20,000 for

1 goodwill and \$20,000 for non-compete agreement. \$30,000 was paid
2 down, and the balance to be paid in monthly installments of
3 \$726.83 per month. The source of the down payment was an initial
4 royalty payment of \$50,000 from Wilbur Ellis Company.

5 The intended sale to the son-in-law did not occur and the
6 pizza parlor failed to generate anticipated income. In June of
7 1986, the plaintiffs made demand on the defendant to satisfy
8 delinquent property taxes due the county. In October, 1986,
9 plaintiffs advised defendant that \$8,472.10 plus interest was
10 delinquent for two tax years and gave him ten days to pay the
11 taxes or be subject to remedies for default on the land sale
12 contract.

13 The defendant made a proposal to liquidate royalty
14 contracts to satisfy the taxes, but for reasons that are not
15 clear, this proposal did not materialize, and the debtor chose to
16 attempt to rescind the contract for fraud November 26, 1986.
17 This conduct was followed by the filing of a suit for specific
18 performance and to foreclose by the plaintiffs in the state court
19 on December 9, 1986.

20 Negotiations between the parties continued over the next
21 sixteen months, during which time the defendant was attempting to
22 sell the property. Several proposed sales were rejected, some
23 rejections triggered by the bank which was required to be in
24 agreement because of the mortgage.

25 During the negotiations, both parties seem to have become
26 unconscious of economic realities, perhaps caused by the

1 plaintiffs' unjustified expectations based on a financial
2 statement given by the defendant to a financial institution which
3 appears to have grossly exaggerated his assets, and by the
4 defendant's unrealistic and unsuccessful efforts to unwind or
5 bail out the deal. The defendant's financial statement is not
6 related to the complaint in these proceedings. It is only
7 background for what developed into a grossly over-lawyered
8 proceeding on both sides.

9 In the litigation, the bank's counterclaim for
10 foreclosure against Stokes was granted. The Stokes prevailed on
11 their claim against Fitzsimmons for specific performance and a
12 deficiency judgment of \$48,614.72 plus interest and attorney fees
13 in excess of \$32,000.

14 Execution by the bank was stayed for a brief period, and
15 Fitzsimmons was given that same time to specifically perform,
16 during which time he continued his unsuccessful attempts to sell
17 the business. Fitzsimmons then surrendered the keys to the
18 business to Stokes' attorney.

19 When scheduled for a creditors' debtor examination, the
20 defendant filed a Chapter 13 skeletal petition (filed through a
21 different attorney than the one handling his negotiations, whose
22 firm did no bankruptcy work). The attorney surprisingly admitted
23 that he knew the debtor was not eligible for Chapter 13, but
24 filed it as a negotiating tool. The Chapter 13 filing was
25 converted after a few days to Chapter 7, and a short time later
26 the challenged schedules and statement of affairs were filed. In

1 fairness to the attorney representing the debtor in these
2 discharge proceedings, he was not involved in the bankruptcy
3 filings.

4 The plaintiffs countered with their complaint, amended
5 complaint and second amended complaint objecting to the debtor's
6 discharge.

7 The defendant's initial responses have been motions for
8 dismissal, for partial summary judgment, assertions of
9 plaintiffs' litigative harassment, and an amended answer,
10 affirmative defenses and counterclaim. The counterclaim seeks
11 judgment for harassment and increasing cost of litigation for
12 which he requests reasonable attorney fees. The parties proposed
13 to pursue this aspect of the litigation separately from the
14 discharge trial.

15 Discovery was aggressive and extensive by both sides.
16 Prior to trial, the parties, remarkably, submitted a joint
17 pretrial order. In that document the defendant represented that
18 after the trial on the discharge issue he will move to amend his
19 answer "to include counterclaims for avoidance of transfer under
20 11 U.S.C. § 544 and violation of the automatic stay under 11
21 U.S.C. § 362 . . ."

22 The plaintiffs "reserve any objections and defenses to
23 the additional counterclaims asserted by defendant."

24 The pretrial order proposed that the plaintiffs amend
25 their second amended complaint by deleting reference to royalty
26 contracts or royalty payments referred to in the second sentence

1 of paragraph 4, and by deleting paragraphs 5, 8, and 9 of the
2 second amended complaint. Thus, there remain for disposition the
3 plaintiffs' allegations seeking denial of the defendant's
4 discharge for the alleged transfer of assets with intent to
5 hinder, delay or defraud creditors proscribed by 11 U.S.C.
6 § 727(a)(2) and for allegedly knowingly and fraudulently making
7 "false oath and accounts in the bankruptcy proceedings by failing
8 to disclose all of his assets, by failing to disclose all of the
9 bank accounts for which he was an authorized signer during the
10 two years preceding the bankruptcy, by misrepresenting income
11 which he received from royalties, and by failing to disclose a
12 prior Chapter 13 bankruptcy proceeding" in violation of 11 U.S.C.
13 § 727(A)(4).

14 Plaintiffs have the burden of proof of all elements of
15 the basis of the objections. Bankruptcy Rule 4005; see In re
16 McNamara, 89 B.R. 648 (Bankr. N.D. Ohio 1988). After this burden
17 has been met by proof of facts supporting a prima facie case, the
18 burden may shift to the defendant to go forward with the evidence
19 to support his defense.

20 Herein the court finds that in paragraph 4 of the
21 debtor's statement of affairs submitted with his Chapter 7
22 petition, he listed only two bank accounts. In fact, within two
23 years preceding his bankruptcy petition, he had been an
24 authorized signer by himself or with others on at least five
25 other bank accounts. He failed to list those other accounts on
26 his Statement of Affairs for a Debtor Engaged in Business. In

1 paragraph 10 of the Statement of Affairs, the defendant also
2 failed to disclose a prior Chapter 13 filing in 1980.

3 The defendant claims that he gave bank account
4 information to his attorney, which the evidence did not support.
5 The defendant also states that he made disclosure at the
6 creditor's meeting, and that the balances in the accounts were
7 minimal or the accounts closed. It is true that for the most
8 part that at the time of filing he was correct. The disclosure
9 came, however, only when a representative of Key Bank confronted
10 him with evidence of the omitted accounts. One of the accounts,
11 in the name of Cloverleaf Products, he used for substantial
12 deposits of personal funds and disbursements for personal
13 purposes of himself and his spouse. Cloverleaf Products, Inc.
14 was a corporation formed for a legitimate purpose. Failure to
15 list the Cloverleaf Products bank account was, however, an
16 important omission because of the deposits to the account and
17 disbursements from it.

18 To be a basis for denial of discharge, the false oaths
19 must be to a material fact. But omissions may constitute a false
20 oath. In re Bastrom, 106 B.R. 223 (Bankr. Mont. 1989); In re
21 Shebel, 54 B.R. 196 (Bankr. Vt. 1985).

22 The value of the accounts may not be significant.
23 Nevertheless, they need be disclosed to enable the trustee and
24 creditors to analyze past transactions relevant to administration
25 of the estate. If relevant to discovery of past transactions,
26 materiality may be present. See In re Kessler, 51 B.R. 895

1 (Bankr. Kan. 1985); In re Butler, 38 B.R. 884 (Bankr. Kan. 1984).

2 Omission of assets may constitute both a concealment to
3 hinder or delay creditors and a false oath. Detriment to
4 creditors need not be shown. See Farmers Co-operative Ass'n. v.
5 Strunk, 671 F.2d 391 (10th Cir. 1982).

6 In addition, the defendant failed to disclose the filing
7 of a prior Chapter 13 case in 1980. He seeks to excuse his
8 omission of filing of a Chapter 13 in 1980 as not a knowing and
9 fraudulent omission because the earlier case was dismissed
10 without administration. Considered alone, this omission might
11 not justify denial of discharge; however, the cumulative
12 omissions may be considered in determining the factual question
13 of the debtor's fraudulent intent or reckless indifference in
14 response to the petition questions tantamount thereto.

15 After the entry of the plaintiff's judgment, the
16 defendant replaced a joint account held by himself and his wife
17 with a new account in her name only. He admittedly made
18 deposits of his earnings and withdrawals from that account after
19 it was placed in his wife's name.

20 The transfer of property by the debtor to his spouse
21 while insolvent, while retaining the use and enjoyment of the
22 property is a classic badge of fraud. See In re McNamara, supra;
23 In re Kaiser, 722 F.2d 1574 (2nd Cir. 1980).

24 Evidence was also introduced relating to transfer of
25 property in Oregon City. It was alluded to in the pretrial order
26 at page 20 thereof. Plaintiffs have made a post-trial motion to

1 amend the pleadings to conform to evidence presented surrounding
2 the transfer. The defendant has resisted the motion. The
3 schedules inexpertly allude to the transaction and the court
4 finds that the evidence surrounding the ultimately aborted
5 transaction was not so concealed as to support the objection on
6 the ground that the transfer was made to hinder or delay
7 creditors. Because there was no surprise to the defendant, the
8 court will consider the amendment to conform with the evidence
9 allowed, although properly it should have been made before
10 considering the filing of two amended complaints. The court,
11 however, finds that the plaintiffs failed on this ground to
12 establish a knowing and fraudulent concealment in making the
13 transfer, and that the reference to it in the schedules negatives
14 intent to conceal. The transaction has no bearing on the court's
15 decision in the proceeding.

16 Finally, the plaintiffs urge that they are entitled to
17 prevail on a preponderance of the evidence standard, and the
18 defendant urges a clear and convincing proof standard.

19 It is difficult to reconcile the hornbook law that the
20 right to discharge is to be liberally construed with the lesser
21 standard, and there is a split of authority on the question. See
22 In re Bone, 7 B.R. 549 (Bankr. M.D. Ga. 1980). The issue does
23 not appear to have been ruled on under the Bankruptcy Code by the
24 Ninth Circuit Court of Appeals. See In re Ayala, 107 B.R. 271
25 (Bankr. E.D. Ca. 1989). However, the reasoning appears to be
26 that the ordinary standard in civil cases, the preponderance of

1 the evidence, should be applied and the court believes that to be
2 the trend in this circuit and applicable to these proceedings.
3 This court finds, however, that applying either standard the
4 evidence supports the conclusion that the defendant in signing
5 his schedules and statements of affairs did so clearly knowing of
6 the omissions with the intent to provide only minimal basis for
7 creditor scrutiny of his past transactions. His answers in
8 testimony were vague and slippery, as they were at the § 341(a)
9 creditors' meeting and in depositions.

10 There was in his wife's bank account, on which he
11 admitted he signed checks and made deposits, in excess of \$700 at
12 the time of his filing. This is not a significant amount, but
13 the evidence surrounding its use was to have it as a vehicle to
14 hinder or delay creditors. While he was not a nominal signatory
15 to the account, his accessible use of it should have been
16 disclosed in the statements of affairs and schedules.

17 It has been said that the discharge is reserved for the
18 honest debtor who is entitled to a fresh start after laying his
19 non-exempt assets at the feet of his creditors.

20 As the court in In re Ayala, supra, opined,
21 "Unfortunately, the Bankruptcy Code does not provide for a petty
22 denial of discharge. It simply provides for denial of discharge.
23 Logically, the amount of money is immaterial except for the
24 single purpose of tending to negate fraudulent intent." See
25 also, In re Chalik, 748 F.2d 616 (11th Cir. 1984); In re Tully,
26 818 F.2d 106 (1st Cir. 1987); In re Mascola, 505 F.2d 274 (1st

1 Cir. 1974); In re Diodati, 9 B.R. 808 (Bankr. Mass. 1981).

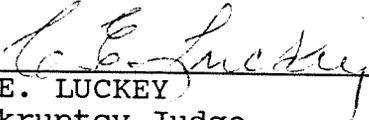
2 The defendant's discharge will be ordered denied pursuant
3 to 11 U.S.C. § 727(a)(2) and 11 U.S.C. § 727(a)(4).

4 This narrative Memorandum Opinion contains the court's
5 Findings of Fact and Conclusions of Law and pursuant to
6 Bankruptcy Rule 7052 they will not be separately stated.

7 IT IS ORDERED that each party shall bear his or her
8 attorney fees and costs in these proceedings and separate
9 judgment consistent herewith will be entered.

10 DATED this 6 day of Sept, 1990.

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C. E. LUCKEY
Bankruptcy Judge

26 cc: Danny H. Gerlt
Laura J. Walker