IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
JEFFREY LEWIS GRINOLDS,	)	
fdba JEFF GRINOLDS LOGGING,	)	**Case No. 03-20537-TLM**
	)	
Debtor.	)	
______________________________	)	
	)	**MEMORANDUM OF DECISION**
JAMES SOUDERS	)	
	)	
Plaintiff,	)	
	)	**Adv. Case No. 03-06215-TLM**
v.	)	
	)	
JEFFREY LEWIS GRINOLDS and	)	
JEFF GRINOLDS LOGGING,	)	
	)	
Defendants.	)	
______________________________	)	

I. INTRODUCTION

Jeffrey Lewis Grinolds ("Debtor") filed a voluntary, individual chapter 7 bankruptcy petition on April 9, 2003, commencing Case No. 03-20537-TLM. *See* Doc. No. 1.[1] Creditor James Souders ("Plaintiff") filed a complaint on July 7, 2003, initiating Adversary Case No. 03-06215-TLM. Adv. Doc. No. 1.[2]

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[1] Pleadings and filings in the chapter 7 case are referred to in this Decision as "Doc. No." and pleadings in the adversary proceeding as "Adv. Doc. No." The Court has taken judicial notice of its files and records in the chapter 7 case. *See* Adv. Doc. No. 96 (minute entry); Fed. R. Evid. 201.

[2] The complaint was timely filed. See Fed. R. Bankr. P. 4004(a).

In his complaint,[3] Plaintiff objected to Debtor's discharge based on § 727(a)(2)(A).[4] Twenty-one months later, for the first time, Plaintiff objected to Debtor's discharge under § 727(a)(4) in his memorandum in support of summary judgment. *See* Adv. Doc. No. 75 at 5; *see also* discussion, *infra*.

Trial was held on April 11, 2006, with Debtor appearing *pro se*. At the close of evidence, Plaintiff requested the Court consider the complaint amended to conform to the evidence. *See* Fed. R. Civ. P. 15(b); Fed. R. Bankr. P. 7015. In addition to the § 727(a)(2)(A) cause of action pleaded in the complaint, Plaintiff sought to deny Debtor's discharge on several other § 727(a) grounds. The Court granted Plaintiff's request as to § 727(a)(3) and § 727(a)(4), and asked the parties to file written closing arguments. Adv. Doc. No. 96 (minute entry). The matter was taken under advisement upon conclusion of post-trial briefing.[5]

The Court has considered carefully the witnesses testimony, with special attention to credibility. It has evaluated the documentary evidence submitted, and the documents signed and filed in Debtor's chapter 7 case. Fed. R. Evid. 801(d).

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[3] Plaintiff named both Debtor and "Jeff Grinolds Logging" in the caption of the complaint, as noted above. *See* Adv. Doc. No. 1. However, the complaint only asserted causes against Debtor, *see id.*, the complaint was served only on Debtor, *see* Adv. Doc. No. 2, and issues of discharge under § 727(a) necessarily concerned only him. There is no "second" defendant despite Plaintiff's form of caption.

[4] References are made to the Bankruptcy Code, Title 11, U.S. Code, as it existed prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8 ("BAPCPA"). Both Debtor's petition and initiation of the adversary proceeding preceded BAPCPA's effective dates of April 20, and October 17, 2005.

[5] *See* Adv. Doc. No. 97 (Plaintiff's brief); Adv. Doc. No. 98 (Debtor's brief).

The Court determines Debtor's discharge will be denied. This Decision constitutes the Court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

II. BACKGROUND AND FACTS

Debtor and Plaintiff have been in litigation for nearly a decade over a commercial log-hauling contract. Plaintiff filed a state court lawsuit in December, 1997, and received a judgment of approximately $10,000.00 in September, 2002.[6] Debtor filed his chapter 7 petition a little over six months later.[7]

A. Debtor's bankruptcy filing

1. Debtor's schedules and statements

Debtor filed his petition under the name and style "Jeffrey Lewis Grinolds Fdba [formerly doing business as] Jeff Grinolds Logging." Doc. No. 1 at 1. He listed no real property.[8] *Id.* at sched. A. Debtor indicated on his personal property schedule he had no checking or savings accounts. *Id.* at sched. B. He thought he may have been owed an Earned Income Credit and a tax refund. *Id.* Debtor also scheduled an approximate $7,000.00 "[c]laim against Ed Hendrickson for loading

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[6] Nez Perce County Case No. CV97-02366.

[7] Kenneth Anderson was Debtor's attorney in the bankruptcy case and, initially, in this adversary proceeding. In September, 2004, the Court permitted Anderson to withdraw from the bankruptcy case and the adversary proceeding. *See* Doc. No. 26 (minute entry); Adv. Doc. No. 56. Debtor thereafter appeared *pro se.* Doc. No. 29; Adv. Doc. No. 61.

[8] Apparently Debtor lives rent-free in a house owned by his grandmother.

logs." *Id*. The only vehicle or equipment listed was a "1985 Peterbilt (wrecked)" valued at $300.00,[9] and assorted tools. Debtor listed $30.00 cash on hand. *Id.*

Plaintiff's state court judgment appeared on the schedule of unsecured debts as a "complaint filed" with an "amount claimed" of $10,047.00. Doc. No. 1 at sched. F.[10] Debtor also listed his father, Neil Grinolds, twice on this schedule - once for a $14,000.00 debt for "Equipment rent; 1997-present" and again for an "unknown" debt for "contract regarding equipment rental." *Id.*

Debtor also scheduled a lease agreement for logging equipment from his father, but listed no other executory contracts or unexpired leases. *Id*. at sched. G. Debtor testified the lease agreements with his father were oral.

Debtor asserted he was "unemployed" with total monthly income of $0.00 and total monthly expenses of $470.00. *Id*. at scheds. I, J. In his statement of financial affairs, Debtor disclosed $0.00 in gross business income for 2001, though he also there stated an "unknown" amount of income that year. *Id*. at statement of fin. affairs (response to question 1). Debtor also stated his gross income for 2002 and the first three months of 2003 was $7,000.00. *Id*. Debtor signed under penalty

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[9] Plaintiff, at trial and in his post-trial brief, tried to establish that Debtor sold the vehicle's engine for $1,500 to a Mr. Lee Eddins pre-petition. Adv. Doc. No. 97 at 4. Plaintiff asserts Debtor violated § 727(a)(2) and (a)(3) by not documenting and disclosing the transaction. However, the check Plaintiff offers to support this proposition was dated October 11, 2003 - six months post-petition. *See* Ex. 3 at 5045 (check for "400 Cummins" engine). Furthermore, Debtor testified at trial he was not sure whether that check was for the Peterbilt engine or parts from a 1977 Western Star.

[10] Plaintiff did not file a claim because this was a no-asset case.

of perjury, as true and correct to the best of his knowledge, the verification of the schedules and the statement of financial affairs. *See* Doc. No. 1 at 19, 25.[11]

B. Debtor's records

In 2003, Plaintiff served Debtor with a "Notice of Rule 2004 Examination" and requested Debtor produce records relating to his "financial matters" including any leases, bank records, tax returns, loan documents, financial statements, and other records. Doc. Nos. 18, 24; *see also* Doc. No. 14 (Order granting Rule 2004 examination of Debtor). Debtor only produced his 2001 federal tax return and a 2002 extension request. *See* Jeffrey Grinolds Exam., Sept. 26, 2003, Exs. 2-3.[12] Steve D. Gaines of the Idaho State Tax Commission testified at trial there was no record that Debtor had filed an Idaho state tax return between 1994 and 2005.

Debtor produced one other document at trial, a 2001 IRS Form 1096 ("Annual Summary and Transmittal of U.S. Information Returns") that listed the "filer's name" as "Jeffery Grinolds/Jeff Grinolds Logging." Ex. E. Debtor claimed he had recently found the form in the back of a truck he was driving.[13]

When questioned about the dearth of business and personal records, Debtor testified at his Rule 2004 Exam and at trial that an ex-girlfriend took them when

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[11] Debtor amended his schedules only once, listing an unknown amount of tax debt owed the Idaho Department of Labor/Employer Accounts Bureau in his schedule E. *See* Doc. No. 15.

[12] Debtor's Rule 2004 Exam transcript was published at trial and will be considered by the Court. *See* Adv. Doc. No 96 (minute entry). Debtor's tax return documents were attached as exhibits thereto. Future references will be to "Grinolds Exam."

[13] Testimony at the Grinolds Exam indicated Debtor produced some checking account records in the state court lawsuit. Grinolds Exam at 12:16-25.

she moved to California just prior to the bankruptcy. *See* Grinolds Exam. 10:7-11. Debtor also testified at the Rule 2004 Exam that he gave some records to a woman named Dorothy Hunter so she could prepare his 2001 federal tax return. Hunter has since died. *Id*. at 7:6-18. Hunter's business closed upon her death, and Debtor claims he has not been able to retrieve his records from any remaining officers of the business or Hunter's estate. *Id*. at 8:16-25.

C. Business name(s)

As noted, Debtor's petition caption disclosed that he "formerly" did business as Jeff Grinolds Logging.[14] However, Debtor's statement of financial affairs required him to disclose the names, and certain additional information, regarding all businesses in which he was an officer, director, partner, or a sole proprietor. *See* Doc. No. 1 at statement of fin. affairs (response to question 18). Debtor answered "none" to this question. *Id.* The evidence establishes Debtor actually operated under two different trade names as a sole proprietor: "Jeff Grinolds Logging" and "Grinolds Fabrication." The second name does not appear anywhere in Debtor's bankruptcy filings.

Debtor testified he omitted disclosure of "Grinolds Fabrication" because his customers used "Jeff Grinolds," "Jeff Grinolds Logging" and "Grinolds

[14] In addition, Debtor's statement of financial affairs listed several lawsuits against him "dba Grinolds Logging." *See* Doc. No. 1 at statement of fin. affairs (response to question 4).

Fabrication" interchangeably.[15] Debtor claimed the reason he used the different trade names was to save money on workman's compensation insurance, asserting premiums were lower for a "fabrication" business than a "logging" business.[16]

D. Income

Regardless of the trade name(s) Debtor used, he clearly grossed far more money than his statement of financial affairs reflected. Plaintiff introduced checks made out to "Grinolds Fabrication" from Bennett Lumber Company ("Bennett") in 2000 totaling nearly $72,000.00. Ex. 2(d) at 193-203 (checks). Bennett paid $210,894.40 to Debtor in 2001, Ex. 2(a) (Form 1099), and $211,376.71 in 2002. Ex. 2(b) (Form 1099). In the first three months of 2003 leading up to the

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[15] There is evidence supporting this contention. For instance, Plaintiff produced copies of checks made out by Bennett Lumber Company ("Bennett") to "Grinolds Fabrication" from 2000 to 2003. *See*, Exs. 1, 2(d). Bennett issued IRS Form 1099's to "Jeff Grinolds" in 2001 and 2002, but switched to "dba Grinolds Fabrication" in 2003. Exs. 2(a), (b), (c). The contracts Bennett and Plaintiff entered into over the years are also a mixed bag, with the "Contractor" listed variously as "Grinolds Logging," "Grinolds Fabrication," and "Grinolds Logging Company." Exs. 2(f), (g), (h). *See also* Ex. E (Form 1096 listing "Jeffery Grinolds" and "Jeff Grinolds Logging" under "Filer's name").

[16] Debtor appears to argue that because the names were used interchangably by him or others, like Bennett, the disclosure in the bankruptcy of the "Grinolds Logging" trade name was sufficient to include the other names, including "Grinolds Fabrication." He is wrong. The form of the petition, Official Form 1, in effect at the time of this case required disclosure of "*All* other names used by the Debtor in the last 6 years (include married, maiden, and *trade names*)[.]" (emphasis added). Further, question 18 on the then-required statement of financial affairs requires the disclosure of all business names of a debtor as a sole proprietor, with additional detail. *See* Official Form No. 7 (The current Official Forms 1 and 7, revised after BAPCPA, require the same information, though now for the previous 8, rather than 6, years). The Official Forms are mandatory. *See* Fed. R. Bankr. P. 9009.

bankruptcy, Debtor received checks totaling nearly $92,000.00 from Bennett. *See* Ex. 1 at 3005-3010.[17]

Debtor's assertion in his statement of financial affairs that the amount of gross income received in 2001 was "unknown" is contradicted by the lone tax return he produced in this case.[18] The 2001 federal return shows $300,638.00 in gross receipts (and $46,004.00 in net income) for that year. Grinolds Exam, at Ex. 2. Furthermore, the documents provided by Bennett indicate Debtor received gross income of more than $300,000.00 from Bennett in 2002 and the first three months of 2003.[19] However, Debtor signed as true and correct to the best of his knowledge a statement of financial affairs showing "estimated" gross income in that same period of "$7,000.00." Doc. No. 1 at statement of fin. affairs (response to question 1). The ongoing business of "Grinolds Fabrication," and the receipt of funds immediately before and after the petition date, belie Debtor's schedule I assertion that he was unemployed and without income.[20]

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[17] Debtor received $203,464.82 from Bennett for all of 2003. Ex. 2(c).

[18] The return was signed and dated April 10, 2002, reflecting Debtor's access to this information a year prior to his bankruptcy.

[19] The evidence does not make clear whether Debtor received 2002 income from anyone other than Bennett. However, in the prior year, 2001, the tax return shows about $89,000.00 more in income received than was paid by Bennett. *Compare* Grinolds Exam. at Ex. 2 ($300,638.00) *with* Ex. 2(a) ($210,894.00).

[20] The continued business of "Grinolds Logging" belies the inference necessarily drawn from the assertion on Debtor's petition that he "formerly" did business under that trade name.

E. Accounts

Plaintiff produced records showing Debtor maintained an account with Sterling Savings Bank that was active before and after the April 9, 2003 date of the bankruptcy filing. *See* Ex. 7. A statement on that account covering the period between April 7 and May 5, 2003 showed a beginning balance of $8,098.52 and an ending balance of $8,208.33.[21] *Id.* at 7008. Debtor's balance at the end of business April 9, 2003 was $3,745.15.[22] *Id*. Debtor's schedules, as indicated above, listed no bank accounts and $30.00 cash on hand at the time of filing. Doc. No. 1 at sched. B.[23]

F. Receivables

Debtor's schedules disclosed no receivables or amounts owed him by third parties. Doc. No. 1 at sched. B. However, just after bankruptcy Debtor received

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[21] Debtor states in his post-trial brief that he failed to disclose the Sterling Savings account because he was waiting for checks to clear before closing the account. Adv. Doc. No. 98 at 1. Indeed, the May-June statement indicates several checks were outstanding. Ex. 7 at 7014. In fact, the account was overdrawn before Debtor deposited more than $7,000 to cover the shortfall. *Id*. Regardless, the law does not excuse Debtor from disclosing the existence of the account. Debtor claims in his brief he was acting on advice from counsel, although he offers no evidence to support the assertion. This issue is discussed in more detail *infra*.

[22] The statement covering that period does not provide a daily balance, but it does give the beginning balance on April 7, 2003, as well as the dates and amounts of all account activity, allowing the Court to calculate the closing balance at the end of business on April 9, 2003.

[23] Plaintiff also questioned Debtor about deposits he made into accounts opened by his mother, Eva Grinolds, and an ex-girlfriend, in the years leading up to the bankruptcy. However, the supporting records for both accounts were not in evidence. *See* Adv. Doc. No. 96 (minute entry, noting Ex. 6 marked but not offered, and Ex. 10 withdrawn). Debtor admitted making deposits into both accounts so that his mother and ex-girlfriend could pay his personal and business bills using the funds he deposited, but Debtor testified he could not write checks himself from those accounts. Plaintiff also established Debtor opened several post-bankruptcy accounts. Neither the opening of post-petition accounts, nor the use of the mother's and ex-girlfriend's prepetition accounts was shown to be material to the § 727(a) causes of action.

two checks from Charlene Bowman ("Bowman"), dated April 15, 2003 and May 1, 2003, totaling $12,000.00.[24] *See* Ex. 7 at 7009-7010. Debtor indicated he and Bowman used to date and are still friends. Debtor testified he had lent Bowman money prior to the bankruptcy to help her pay for a home, college expenses and the costs of a divorce. He thought the $12,000.00 may have been partial payment for the money she owed him.[25]

G. Leases

Dave Fritts, Bennett's resource manager, verified the checks and other records evidencing payments made to Debtor. Fritts further testified Debtor leased a shop building from Bennett for $400.00 a month. Records submitted in this case support the testimony that this lease was in effect at the time of Debtor's filing. *See* Ex. 2(I). Debtor did not disclose the unexpired lease or lease payment on his schedules G or J, and offered no explanation for the omissions.

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[24] The payments, for $5,000.00 and $7,000.00 came in the form of cashier's checks from the Potlach Federal Credit Union. Typed under the "Pay" line was: "Jeff Grinolds/Re: Charlene Bowman." The checks, by themselves, do not make it entirely clear that Bowman purchased the checks. However, Debtor confirmed at trial that Bowman did indeed buy them and present them to Debtor.

[25] The money owed Debtor could have been listed under schedule B as "Accounts receivable," "Other liquidated debts owing debtor," or "Other personal property of any kind not already listed." Debtor argued the initial omission was unintentional. However, even if that argument were credible and accepted, upon the receipt of the amounts Bowman owed Debtor, which clearly were property of the estate under § 541(a)(1), Debtor had to amend his schedules and had to provide his trustee with the funds. *See*, *e.g.*, § 521. He did neither.

H. Equipment

Debtor claims he has not bought any equipment in the past 15 years, opting instead to rent logging equipment his father owns. Debtor claims all of the leases with his father have been oral.

Plaintiff expended much effort attempting to prove Debtor bought equipment prior to filing, titled it in his father's name, and then "leased" it, all in an alleged effort to hide his equitable ownership of those assets. In support of his theory, Plaintiff introduced a "2002 Personal Property Inventory" from the Latah County Assessor's office under Jeff Grinolds' name. Ex. 9. The document contains a handwritten arrow pointing to the list of property along with a handwritten note stating "11/27/02, Equip *sold* to Neil Grinolds." *Id*. (emphasis added). The equipment listed on the document was one Skidder, one log loader and one Crawler tractor.

Debtor testified the handwritten notation most likely indicates a correction made after Debtor, and not his father, was assessed a tax on the equipment. Debtor explained he bought the equipment on his father's behalf, using his father's money. Debtor assumes he was shown as making the actual purchase, perhaps being reported to the County by the dealer as the buyer, and thus assessed the tax. The note, according to Debtor, would have been made after he explained to the assessor that his father actually owned the equipment. Debtor testified he did not write on the document, and Plaintiff never established who did.

I. Prepetition contracts

Debtor also entered into at least two prepetition contracts with Bennett that had post-petition effect.[26] *See* Ex. 2(c) at 159, 170. Under the terms of these contracts, Debtor was to be paid bi-weekly for logs delivered and received by "GBLC log yard" in Clarkston, Washington that met the contract requirements. *Id*. at 167, 179 (Exhibit A to contracts). It appears, from the face of the documents, performance was still due by both parties at the time Debtor filed his petition. These were therefore executory contracts within the ambit of § 365, and should have been listed on schedule G. Debtor did not so schedule either contract. Nor did he indicate whether any income had accrued under the contracts based on pre-petition delivery of logs. Nor did he show his ongoing business operations on schedule I or otherwise disclose them.

III. DISCUSSION AND DISPOSITION

A. § 727(a) objections in general

Objections to discharge are liberally construed in favor of debtors, and strictly against objectors. *Palmer v. Downey (In re Downey)*, 242 B.R. 5, 12-13, 99.4 I.B.C.R. 165, 168 (Bankr. D. Idaho 1999) (citing *In re Bernard*, 96 F.3d 1279, 1281 (9th Cir. 1996); *Devers v. Bank of Sheridan, Mont. (In re Devers)*, 759 F.2d 751, 754 (9th Cir. 1985)). This rule is consistent with the purpose of

[26] The contracts in question were both entered into between Debtor, using the "Grinolds Fabrication" name, and Bennett on March 17, 2003 - only three weeks before Debtor's bankruptcy. One contract covered a logging job in Latah County, Idaho, while the other was for a job in Asotin County, Washington.

providing debtors a "fresh start," and recognizes that denial of discharge is among the harshest remedies under the bankruptcy laws. *Downey*, 242 B.R. at 12-13, 99.4 I.B.C.R. at 168 (citing *Weiner v. Perry, Settles & Lawson (In re Weiner)*, 161 F.3d 1216, 1218 (9th Cir. 1998)).

Despite this favorable construction, a bankruptcy discharge is equitable in nature, and intended only for honest debtors. *Downey*, 242 B.R. at 13, 99.4 I.B.C.R. at 168 (citing *Bernard*, 96 F.3d at 1283). The objector must prove the elements of the cause of action by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 284 (1991); *Beauchamp v. Hoose (In re Beauchamp),* 236 B.R. 727, 730 (9th Cir. BAP 1999).

B. Plaintiff's standing

As a threshold matter, Plaintiff must prove he has standing to bring the instant action. Only a creditor, trustee or U.S. Trustee may object to the granting of a discharge in bankruptcy. *See* § 727(c). A "creditor" is an "entity that has a claim against the debtor" that arose before the filing of the bankruptcy petition, and a "claim" is a right to payment, whether or not such right is reduced to judgment. *See* §§ 101(5), 101(10).

Plaintiff did not introduce into evidence his state court judgment against Debtor. However, Debtor scheduled Plaintiff as holding an undisputed claim, *see* Doc. No. 1 at sched. F, and a debtor's sworn schedules are subject to treatment as admissions under Fed. R. Evid. 801. Furthermore, the judgment and its value were

alleged in Plaintiff's complaint and admitted in Debtor's answer. Adv. Doc. Nos. 1, 3. Debtor also admitted at trial the judgment was entered against him.

The Court concludes Plaintiff has the requisite creditor standing.

C. Cause of action under § 727(a)(3)

At the close of the trial, the Court indicated the parties would be able to argue whether § 727(a)(3)[27] required denial of discharge, and that the pleadings should be deemed amended to conform to the evidence presented. Additional reflection persuades the Court it erred, that the pleadings should not be deemed so amended, and Plaintiff's request to submit a § 727(a)(3) cause should be denied.

Fed. R. Civ. P. 15, made applicable by Fed. R. Bankr. P. 7015, governs amendments to pleadings and provides, *inter alia*, that "leave [to amend] shall be freely given when justice so requires." The Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962), identified several factors courts could use in addressing the question. *Id.* at 182.[28] This non-exclusive list of factors, sometimes called the *Foman* Factors, has been used in this Circuit. *See*, *e.g.*, *Johnson v. Buckley*, 356

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[27] § 727(a)(3) states:

> The court shall grant the debtor a discharge, unless– (3) 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[.]

[28] The factors include undue delay, bad faith, or dilatory motive by the movant, repeated failure to cure pleading deficiencies by amendments earlier allowed, undue prejudice to the adverse party if the amendment is allowed, and futility of amendment. *Id.*

F.3d 1067, 1077 (9th Cir. 2004); *Chodos v. West Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002); *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 9th Cir. 1999).

Here the complaint was filed in July, 2003. It pleaded only a § 727(a)(2)(A) cause of action. Adv. Doc. No. 1 at 2. After Debtor answered (then through an attorney), trial was set for May, 2004. Adv. Doc. No. 9. It became evident to the Court that neither side was prepared to proceed, and that discovery disputes and other issues required the trial to be vacated. *See* Adv. Doc. No. 22. Debtor's counsel was allowed to withdraw in September, 2004.

In April, 2005, Plaintiff brought a motion for summary judgment. *See* Adv. Docs. No. 74-82. Though the Court denied the motion,[29] the briefing Plaintiff filed alerted Debtor that Plaintiff believed a cause existed under § 727(a)(4). Adv. Doc. No. 75 at 5. The briefing, however, said nothing about § 727(a)(3), nor did anything else Plaintiff submitted over the several years leading up to trial.

The Court concludes the *Foman* Factors of undue delay and prejudice to Debtor require denial of the request to deem the complaint amended to assert a § 727(a)(3) cause of action.

A debtor can respond to a § 727(a)(3) allegation by showing records in fact existed, or by explaining their absence or inadequacy.[30] But a debtor must be

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[29] The summary judgment motion was denied, in part, because Plaintiff failed to comply with L.B.R. 7056.1 governing such motions. Plaintiff tried once again to obtain summary judgment. *See* Adv. Doc. Nos. 85-89. That motion was also denied. *See* Adv. Doc. No. 90 (minute entry). The briefing in both motions was nearly identical.

[30] *See generally*, *Lansdowne v. Cox (In re Cox)*, 41 F.3d 1294 (9th Cir. 1994); *Sterling*
(continued...)

fairly put on notice that such an issue will be presented, and given an opportunity to amass the evidence he wishes the Court to consider. That simply did not occur here. The delay was significant and unreasonable, and the prejudice to Debtor clear. Plaintiff's request to consider a § 727(a)(3) action will therefore be denied.

D. Cause of action under § 727(a)(2)(A)

Section 727(a)(2)(A) provides:

> (a) The court shall grant the debtor a discharge, unless – (2) 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[.]

To deny a debtor a discharge under this provision, the plaintiff must prove by a preponderance of the evidence (1) disposition of property, such as transfer or concealment, (2) a subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act of disposing of the property, and (3) the disposition with requisite intent took place within a year of debtor's filing. *Fogal Legware of Switzerland, Inc. v. Wills (In re Wills)*, 243 B.R. 58, 65 (9th Cir. BAP 1999); *Oldemeyer v. Couch-Russell (In re Couch-Russell)*, 03.4 I.B.C.R. 230, 233 (Bankr. D. Idaho 2003).

Fraudulent intent may be inferred from the actions of the debtor, and established by circumstantial evidence or inferences from a course of conduct.

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[30](...continued)
Int'l, Inc. v. Thomas (In re Thomas), 03.3 I.B.C.R. 178 (Bankr. D. Idaho 2003).

First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1343 (9th Cir. 1986); *Devers,* 759 F.2d at 753-54 (the court "may deduce fraudulent intent from all the facts and circumstances"); *E. Idaho Fed. Credit Union v. Thomason (In re Thomason)*, 98.3 I.B.C.R. 77 (Bankr. D. Idaho 1998) (actual, not constructive, intent is required, but may be proven circumstantially).

Plaintiff established, *inter alia*, that Debtor, at the time of filing, continued in business;[31] operated under a second trade name; held at least one prepetition bank account; leased a shop building; had two ongoing logging contracts with Bennett; had substantial gross business income in 2001, 2002 and 2003; and was owed money by Bowman and potentially Bennett. Debtor disclosed none of this information.

While relevant to a § 727(a)(4)(A) analysis, none of these facts directly relate to the knowing and fraudulent transfer of property within the year preceding the filing of the bankruptcy with intent to hinder, delay or defraud a creditor.

Plaintiff claims the Latah County personal property tax records show a transfer of a vehicle to Debtor's father in November, 2002, within the year before the bankruptcy filing. However, Debtor's explanation of the nature of this transaction was not rebutted, and Plaintiff failed to present independent competent

[31] Debtor argues the whole purpose of chapter 7 relief is to give debtors a "fresh start" and, also, that there is no prohibition on a chapter 7 debtor engaging in business after filing. Though these statements are generally true, Debtor fails to appreciate that the lack of honest and accurate disclosure regarding such conduct gives rise to the issues in this case, including the possibility that a discharge and a fresh start might be denied.

evidence that Debtor bought and owned the property and then transferred it to his father with the intent to hinder or defraud creditors.

The Court has considered prior cases in which § 727(a)(2)(A) claims were advanced and proven, such as *Couch-Russell*. However, the degree and clarity of proof was substantially different there. *See* 03.4 I.B.C.R. at 233. Similarly, denial of a debtor's discharge under this provision in *Rakozy v. McGary (In re McGary)*, 91 I.B.C.R. 145 (Bankr. D. Idaho 1991), was based on evidence more cogent and compelling than exists in the instant case. *Id.* at 147-48.

Plaintiff has not shown by a preponderance of the evidence that Debtor engaged in prepetition conduct, with the requisite intent § 727(a)(2)(A) demands.

E. Cause of action under § 727(a)(4)(A)

Section 727(a)(4)(A) requires denial of discharge if:

> [T]he debtor knowingly and fraudulently, in or in connection with the case – (A) made a false oath or account[.]

To bring a successful § 727(a)(4)(A) claim, the plaintiff must show: (1) the debtor made a false oath in connection with the case; (2) the oath related to a material fact; (3) the oath was made knowingly; and (4) the oath was made fraudulently. *Roberts v. Erhard (In re Roberts)*, 331 B.R. 876, 882 (9th Cir. BAP 2005) (citing *Wills*, 243 B.R. at 62).

1. False oath

A "false oath" under § 727(a)(4)(A) includes false affirmative statements, or knowing omissions, on a debtor's schedules and statements of affairs, which are

signed under penalty of perjury. *Roberts*, 331 B.R. at 882; *Downey*, 242 B.R. at 13, 99.4 I.B.C.R. at 168.[32]

2. Material fact

The word "material" does not appear in § 727(a)(4), but a plaintiff must show the "false oath or account" relates materially to the bankruptcy. *Weiner v. Perry, Settles & Lawson, Inc. (In re Weiner)*, 208 B.R. 69, 71 (9th Cir. BAP 1997), *rev'd on other grounds*, 161 F.3d 1216 (9th Cir. 1998). As *Weiner* stated:

> In determining whether the false statement is material, the court looks to whether the statement bears a relationship to the debtor's estate, and concerns the discovery of assets, or the existence and disposition of his property. *See Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 618 (11th Cir. 1984). "The recalcitrant debtor may not escape a section 727(a)(4)(A) denial of discharge by asserting that the admittedly omitted or falsely stated information concerned a worthless relationship or holding; such a defense is specious." *Id*. at 618.

208 B.R. at 72. *See also Roberts*, 331 B.R. at 883. The asset's value need not be "material," nor must a debtor "succeed in harming creditors to warrant denial of discharge." *Bernard*, 96 F.3d at 1281-82 (quoting *Adeeb*, 787 F.2d at 1343). A "lack of injury to creditors is irrelevant for purposes of denying a discharge in bankruptcy.'" *Id*. *See also Roberts*, 331 B.R. at 883.

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[32] A debtor is required to make full and complete disclosure of assets, liabilities and transactions. *See* § 521; Fed. R. Bankr. P. 1007. This requirement is enforced, *inter alia*, by § 727(a)(4). The function of the requirement is to ensure accurate and dependable information is given to the Court, trustee, and creditors upon which they can rely without the need for additional inquiry. *Downey*, 242 B.R. at 13, 99.4 I.B.C.R. at 168 (citing *Aubrey v. Thomas (In re Aubrey)*, 111 B.R. 268, 274 (9th Cir. BAP 1990)). Debtors may not elect what to disclose; all property and interests in property must be disclosed. *Downey*, 242 B.R. at 13-14, 99.4 I.B.C.R. at 168.

3. Knowledge

The false oath must be made "knowingly" by the debtor. *Roberts* notes "[a] person acts knowingly if he or she acts deliberately and consciously." 331 B.R. at 883-84 (citing Black's Law Dictionary 888 (8th ed. 2004)).[33]

4. Fraudulent intent

The Court must find the false oath was made fraudulently. *Roberts*, 331 B.R. at 884. The intent required is actual, not constructive, and echoes the well established standard in common law fraud that a person make the knowingly false representations "with the intention and purpose" of deceiving. *Id.* (citing *Anastas v. American Savs. Bank (In re Anastas)*, 94 F.3d 1280, 1284 (9th Cir. 1996)); *see also Devers*, 759 F.2d at 753. Actual fraudulent intent may be established through circumstantial evidence, including inferences from the debtor's conduct, all surrounding circumstances, and apparent course of conduct. *Roberts*, 331 B.R. at 884 (citing *Devers*, 759 F.2d at 753-54; *Wills*, 243 B.R. at 64)).

In applying the foregoing standards and requirements to the evidence here, the Court concludes each is met by a preponderance of that evidence.

Debtor made numerous false statements. He indicated "none" when asked to disclose any bank accounts, accounts receivable, other debts owed to him, unexpired leases and executory contracts. He had assets in each such category, including $3,745.15 in a checking account at the time of filing. Bennett logging

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[33] *Roberts* distinguishes "careless" and "reckless" statements from "knowingly" false ones, holding that only false statements or nondisclosures made "knowingly" fall within § 727(a)(4)(A). *Id.* at 884.

contracts were the source of substantial payment before and after filing. The undisclosed loans owed by Bowman resulted in payments to Debtor totaling $12,000.00 within weeks following the filing date.

Debtor made an affirmative representation that his gross income in 2002 and the first three months of 2003 was an "estimated" $7,000.00 when it was in fact over $300,000.00.[34] He stated 2001 gross income was "unknown" when his own tax return established income that year totaled more than $300,000.00.

Debtor did not disclose all the trade names under which he did business, specifically "Grinolds Fabrication," which was in fact the trade name used on many of the financial documents, including those with Bennett, who made substantial payments to Debtor before and immediately after filing. It was, in fact, the trade name Debtor used on contracts with Bennett executed less than a month before bankruptcy. Debtor's schedule I indicated he was unemployed when, in fact, he was continuing to do business as a sole proprietor under the "Grinolds Fabrication" trade name, was under contract with Bennett, and continued to earn income at the time of filing and beyond.[35]

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[34] That Debtor's statement of financial affairs indicates the $7,000.00 is an "estimate" does not save the disclosure. The discrepancy is well over a quarter of a million dollars. Debtor's argument – obliquely made, if at all – that he was disclosing his *net* income is equally unavailing. Question No. 1 on its face requires disclosure of *gross* income. *See Colonial Bank v. Wynn (In re Wynn)*, 261 B.R. 286, 290 (Bankr. M.D. Ala. 2001) (emphasizing rationale for requiring disclosure of gross income and not net profit).

[35] Underdisclosing income raises several issues; one is the skirting of a possible analysis under § 707(b) of the abusiveness of the chapter 7 filing.

The nature of each and every false statement and omission satisfies the requirement of materiality. The magnitude of the undisclosed assets are large, whether viewed in the abstract or in light of the very limited assets Debtor did disclose. Moreover, the absence of truthful disclosure makes a determination of Debtor's financial activity and circumstances all but impossible.

The nature of the information, the significant value involved, the close timing in connection with the petition's filing, as well as consideration of the testimony and credibility of the witnesses, leads the Court to find and conclude the false oaths were knowingly made.

Under the accepted standards, as outlined above, the Court further finds and concludes the false oaths were made fraudulently. The various excuses proffered by Debtor in his testimony were unconvincing. For example, mere oversight is not plausible when dealing with the quantity and size of the omissions here, and is even less persuasive in dealing with affirmative misrepresentations.

Reliance on counsel was suggested, but not in any sense proven. Acting on his attorney's advice may excuse otherwise fraudulent acts, "assuming that all relevant information is in fact provided the attorney." *Downey*, 242 B.R. at 15, 99.4 I.B.C.R. at 169 (citing *In re McLaren*, 236 B.R. 882, 897 (Bankr. D.N.D. 1999)). However, attorney error does not absolve a debtor who signs the petition and schedules under penalty of perjury, from the duty to ensure the information is accurate and complete to the best of his knowledge. *Downey*, 242 B.R. at 15, 99.4 I.B.C.R. at 169 (citing *McLaren*, 236 B.R. at 898).

Debtor offered no evidence that would lead the Court to conclude his attorney advised him to omit the obviously material information or to affirmatively make the misleading statements. Debtor's allegations of attorney error and reliance on the attorney are not credible.

Based on the foregoing, Plaintiff has met his burden under § 727(a)(4)(A) and has established Debtor's discharge should be denied for false oaths on material facts, knowingly and fraudulently made.

IV. CONCLUSION

The request of Plaintiff to amend the complaint to include a cause of action under § 727(a)(3) will be denied. The request for leave to amend to assert a cause of action under § 727(a)(4)(A) will be granted.

The Court finds and concludes Plaintiff did not meet the burden of proving Debtor's violation of § 727(a)(2). However, the Court finds and concludes Plaintiff did prove by a preponderance of the evidence Debtor knowingly and fraudulently made false oaths and accounts in connection with his bankruptcy case in violation of § 727(a)(4)(A).

Debtor's discharge will be denied. A judgment will be entered accordingly.

DATED: May 22, 2006

TERRY L. MYERS
CHIEF U. S. BANKRUPTCY JUDGE