

United States Bankruptcy Court,  
M.D. Florida,  
Tampa Division.

In re Carlos GANUZA, Margie Irene Ganuza, Debtor,  
General Electric Medical Systems, Plaintiff,  
v.

Carlos Ganuza and Margie Irene Ganuza, Defendants.

**Bankruptcy No. 03-5390-8P7.**

**Adversary No. 03-358.**

March 22, 2005.

**Background:** Judgment creditor filed adversary complaint, seeking denial of Chapter 7 debtors' discharge.

**Holdings:** The Bankruptcy Court, Alexander L. Paskay, J., held that:

- (1) because debtors' transfers of their residential and commercial property in El Salvador occurred more than one year before commencement of their bankruptcy case, they could not serve as the basis for denying debtors' discharge, even if done with fraudulent intent;
- (2) judgment creditor failed to establish that the transfers were a sham and that debtors retained control over the properties inside the one-year period prior to filing for bankruptcy;
- (3) debtors' failure to disclose the transfers did not constitute a "false oath"; and
- (4) debtors' failure to list the El Salvador residence as a property in which they had lived within two years of the petition date was not a "false oath" warranting denial of their discharge.

Judgment for defendants.

West Headnotes

**[1] Bankruptcy**  **3315(1)**

51k3315(1) Most Cited Cases

**[1] Bankruptcy**  **3317(1)**

51k3317(1) Most Cited Cases

In a contested discharge proceeding, burden of proof is on the party challenging the discharge, who must prove the elements of its claim by a preponderance of the evidence. Bankr.Code, 11 U.S.C.A. § 727(a); Fed.Rules

Bankr.Proc.Rule 4005, 11 U.S.C.A.

**[2] Bankruptcy**  **3317(1)**

51k3317(1) Most Cited Cases

In a contested discharge proceeding, if the evidence is in equal balance on any elements of the claims asserted by the party challenging the discharge, that party loses because he or she failed to prove an essential element of a claim with the requisite degree. Bankr.Code, 11 U.S.C.A. § 727(a); Fed.Rules Bankr.Proc.Rule 4005, 11 U.S.C.A.

**[3] Bankruptcy**  **3274**

51k3274 Most Cited Cases

**[3] Bankruptcy**  **3276.1**

51k3276.1 Most Cited Cases

Before a debtor's discharge can be denied on the basis of the debtor's fraudulent transfer of estate property, the plaintiff must establish the requisite degree of proof on the following: (1) a transfer took place, (2) the property transferred was property of the estate, (3) the transfer was made with the intent to hinder, delay, or defraud a creditor, and (4) the transfer was made within one year of commencement of the bankruptcy case. Bankr.Code, 11 U.S.C.A. § 727(a)(2)(A).

**[4] Bankruptcy**  **3276.1**

51k3276.1 Most Cited Cases

Where Chapter 7 debtors' transfers of their residential and commercial property in El Salvador occurred more than one year before commencement of their bankruptcy case, such transfers could not serve as the basis for denying their discharge, even if done with fraudulent intent. Bankr.Code, 11 U.S.C.A. § 727(a)(2)(A).

**[5] Bankruptcy**  **2163**

51k2163 Most Cited Cases

Although offers of settlement ordinarily are not admissible in evidence, when such evidence is offered to show intent and does not relate to admission of liability, it is appropriate to consider the same.

**[6] Bankruptcy**  **2163**

51k2163 Most Cited Cases

Judgment creditor failed to establish that Chapter 7 debtors'

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transfers of their residential and commercial properties in El Salvador were a sham and that debtors retained control over the properties inside the one-year period prior to filing for bankruptcy, as required for the allegedly fraudulent transfers to serve as the basis for denying debtors' discharge; although debtors had attempted to settle judgment creditor's claim by offering it their equity in the properties, there was no evidence in the record that debtors exercised any dominant control over the properties, the fact that they stayed in the residence while visiting El Salvador was insufficient to establish an interest in the property, and individual who had purchased the residence from debtors subsequently sold it, and there was no evidence indicating that debtors received any part of the sale proceeds. Bankr.Code, 11 U.S.C.A. § 727(a)(2)(A).

**[7] Bankruptcy**  **3274**

51k3274 Most Cited Cases

**[7] Bankruptcy**  **3282.1**

51k3282.1 Most Cited Cases

To establish a claim for false oath, for discharge denial purposes, creditor must prove that (1) debtors made a statement under oath, (2) the statement was false, (3) debtors knew the statement was false, (4) debtors made the statement with fraudulent intent, and (5) the statement related materially to the bankruptcy case. Bankr.Code, 11 U.S.C.A. § 727(a)(4)(A).

**[8] Bankruptcy**  **3283**

51k3283 Most Cited Cases

Chapter 7 debtors' failure to disclose their transfers of their residential and commercial properties in El Salvador did not constitute a "false oath," for discharge denial purposes, where debtors had no cognizable interest in the properties within one year of bankruptcy, and so they could not have had any interest in the properties about which they could have committed a false oath by their nondisclosure. Bankr.Code, 11 U.S.C.A. § 727(a)(4)(A).

**[9] Bankruptcy**  **3284**

51k3284 Most Cited Cases

Chapter 7 debtors' failure to list their El Salvador residence as a property in which they had lived within two years of the petition date was not a "false oath" warranting denial of

their discharge; although debtors still owned the subject residence 19 months prior to commencing their bankruptcy case and admittedly stayed in that residence for short periods of time while visiting El Salvador within two years of commencement of their case, debtors had a house in Florida during the relevant time, the record did not establish fraudulent intent, and merely occupying the El Salvador property for a short period of time was not enough to establish that property as a "residence" for purposes of debtors' bankruptcy schedules. Bankr.Code, 11 U.S.C.A. § 727(a)(4)(A).

**[10] Bankruptcy**  **3284**

51k3284 Most Cited Cases

While it is true that, in disclosing a transfer, it is not for the debtor to decide what is and is not relevant, it is also true that, in some instances, information being omitted from schedules by mistake does not necessarily constitute a false oath. Bankr.Code, 11 U.S.C.A. § 727(a)(4)(A).

**[11] Bankruptcy**  **3274**

51k3274 Most Cited Cases

**[11] Bankruptcy**  **3282.1**

51k3282.1 Most Cited Cases

To find a false oath, for discharge denial purposes, courts should look for a pattern of omissions that appear to show fraudulent intent. Bankr.Code, 11 U.S.C.A. § 727(a)(4)(A).

**[12] Bankruptcy**  **3271**

51k3271 Most Cited Cases

When considering the denial of a debtor's discharge, the Bankruptcy Code should be construed liberally in favor of the debtor. Bankr.Code, 11 U.S.C.A. § 727(a).

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Joel S. Magolnick, Moscowitz Moscowitz & Magolnick PA, Miami, FL, for Trustee and Plaintiff.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,**

**MEMORANDUM OPINION**

ALEXANDER L. PASKAY, Bankruptcy Judge.

THE MATTER under consideration in this Chapter 7 case is a two-count Complaint file by General Electric Medical

Systems (GEMS) against Carlos Ganuza and Margie Irene Ganuza (Debtors). In Count I of its Complaint, GEMS contends that the Debtors are not entitled to the overall protection of the general bankruptcy discharge pursuant to 11 U.S.C. 727(a)(2)(A) because the Debtors transferred property with the intent to hinder or delay their creditor within one year of the commencement of their Chapter 7 case. In Count II, GEMS contends that the Debtors are not entitled to discharge pursuant to 11 U.S.C. 727(a)(4)(A) because they did willfully and knowingly commit false oath in connection with their Chapter 7 case. This Court heard argument of counsel for both parties at the duly scheduled final evidentiary hearing, and has reviewed the record and post-trial briefs and the following pertinent facts were revealed.

In 1999, GEMS sued the Debtors as well as their Salvadoran Company, Centro de Imagenes Resonancia y Magnetica, S.A. (CIRMA) in the United States District Court for the Southern District of Florida. The District Court action arose out of a breach of a promissory note and personal guaranty relating to medical equipment that was sold to CIRMA. On or about September 7, 2001, a Final Judgment was entered in favor of GEMS and against the Debtors and CIRMA. On December 14, 2001, an Amended Final Judgment was entered which, including prejudgment interest, was in an amount in excess of \$2 million.

Prior to the commencement of the District Court action, the Debtors owned a residential property and a commercial property in San Salvador, El Salvador. According to the Debtors, on or about September 6, 2001, the Debtors transferred their entire interest in the residential property to Javier Mitjavila (Javier), the Debtors' nephew. They also transferred their entire interest in the commercial property to Consuelo Mitjavila (Consuelo), Javier's mother, along with the underlying mortgage on the building. These transfers were properly filed and recorded in El Salvador (Def. Exh. 1 and 2).

On March 18, 2003, the Debtors filed their Petition for Relief under Chapter 7 of the Bankruptcy Code. On June 17, 2003, GEMS filed their Complaint commencing this adversary proceeding. As noted earlier, GEMS seeks a denial of the Debtors' discharge pursuant to Sections

727(a)(2)(A) and 727(a)(4)(A) of the Bankruptcy Code.

[1][2] Before considering the validity of these claims, seriatim, it should be pointed out that, pursuant to F.R.B.P. 4005, the burden of proof in a contested discharge proceeding is clearly on the party who is challenging the discharge. The standard required to meet the burden is no longer clear and convincing, but a mere preponderance of the evidence will suffice. See *In re Grogan v. Garner*, 498 U.S. 279, 111 \*189 S.Ct. 654, 112 L.Ed.2d 755 (1991); *Marine Midland Bank, N.A. v. Mollon*, 160 B.R. 860, 864 (M.D.Fla.1993). Thus, if the evidence is in equal balance on any elements of these claims, the plaintiff loses because the plaintiff failed to prove an essential element of a claim with the requisite degree.

[3] Considering first the claim of a fraudulent transfer under Section 727(a)(2)(A) of the Bankruptcy Code, there is no question that before discharge can be denied the plaintiff must establish the requisite degree of proof on the following: (1) a transfer took place; (2) the property transferred was property of the estate; (3) the transfer was made with the intent to hinder delay or defraud a creditor; and (4) the transfer was made within one year of commencement of the bankruptcy case. See *In re Ingersoll*, 106 B.R. 287, 292 (Bankr.M.D.Fla.1989).

[4] In the present instance, it is without dispute that the Debtors did transfer their interest in the commercial property and the residence located in El Salvador. While there is some dispute concerning the date of the transfer and whether there was consideration paid, this Court is satisfied that the properties were transferred while the Debtors were involved in litigation with GEMS. This Court is also satisfied that the Debtors transferred the property with the purpose of removing these properties from the reach of GEMS. The difficulty, however, is that regardless of the precise date of transfer, it is certain that the transfers occurred outside of the statutorily required one year before commencement of the Chapter 7 case. Therefore, no viable claim can be sustained under Section 727(a)(2)(A).

To overcome the time bar, GEMS contends that the transfer was, in fact, a sham transfer and, notwithstanding that the title might have been formally transferred to Javier and

Consuelo, the Debtors retained all control over the properties inside the year prior to the filing for bankruptcy.

[5] In support of this proposition, GEMS points to the Debtors' E-mail on February 13, 2002 in which they made an offer to settle the claim of GEMS. As part of the settlement, in addition to cash, the Debtors also offered to GEMS equity in their commercial property and residence in El Salvador. Offers of settlement ordinarily are not admissible in evidence. However, when such evidence is offered to show intent and does not relate to admission of liability, it is appropriate to consider the same. *Agan v. Katzman & Korr, P.A.*, 328 F.Supp.2d 1363 (S.D.Fla.2004).

[6] In the present instance, while this Court will consider the E-mail, it is satisfied that this E-mail is insufficient to tip the balance of the scale in favor of GEMS for the following reasons: (1) there is no evidence in this record whatsoever that the Debtors exercised any dominant control over the property; (2) the fact that they stayed in the residence while visiting is not sufficient to establish an interest; and (3) most importantly, it is without dispute that Javier sold the residence in early 2002 and there is no evidence in the record to indicate that the Debtors received any part of the proceeds of that sale.

In sum, this Court is satisfied that the Debtors transferred their interest in the commercial property and the residence outside the one year period prior to bankruptcy and no longer had any cognizable interest in these properties within one year preceding the Chapter 7 case.

This being the case, the Plaintiffs have failed to establish essential elements of this claim. Therefore, the Debtors are entitled to judgment on Count I against \*190 GEMS dismissing this claim with prejudice.

[7] This leaves for consideration the claim in Count II, false oath in bankruptcy. GEMS contends that the Debtors maintained an interest in the El Salvador properties inside of one year prior to commencement of their Chapter 7 case and the Debtors' failure to disclose this interest and the transfer of the properties on their schedules and Statement of Financial Affairs constitutes a false oath under 11 U.S.C. 727(a)(4)(A). To establish a claim for false oath, GEMS

must prove that: (1) the Debtors made a statement under oath; (2) the statement was false; (3) the Debtors knew the statement was false; (4) the Debtors made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. *In re Perry*, 252 B.R. 541 (Bankr.M.D.Fla.2000).

[8] The Statement of Financial Affairs (SOFA) in Section 10 asks the Debtors to disclose any transfers of property outside of the ordinary course of business that occurred within one year of the commencement of the case. Since this Court has already found that the Debtors had no cognizable interest in the El Salvador properties within one year of bankruptcy to support a claim of a fraudulent transfer, the Debtors could not have had any an interest in the properties about which they could have committed a false oath in Section 10 by failing to disclose the transfer.

[9] In Section 15 of the SOFA, the Debtors were required to list any property in which they had lived within two years prior to commencement of the Chapter 7 case. The Debtors argue that they considered their residence during the relevant period to be the house in Florida and, therefore, their failure to list the El Salvador properties in Section 15 of the SOFA is not sufficient to establish that they committed a false oath.

The record shows that the Debtors still owned the El Salvador properties until September of 2001, or approximately 19 months prior to commencing their Chapter 7 case. Further, the Debtors do not contest that they did stay in the El Salvador residence for short periods of time while visiting El Salvador within two years of commencement of their bankruptcy case. Depo. p. 8. [FN1]

FN1. Refers to the Deposition of Carlos Ganuza, *General Electric Medical Systems v. Carlos Ganuza and Margie Irene Ganuza*. Adv. Pro. No. 8:03-ap-00358-TEB, United States Bankruptcy Court for the Middle District of Florida Tampa Division, July 9, 2004.

[10] However, these facts alone do not establish that the Debtors treated the El Salvador residence as a place to live for any indefinite period of time. While it is true that "it is

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not for the debtor to decide what is and is not relevant" it is also true that, in some instances, information being omitted from schedules by mistake does not necessarily constitute a false oath. See *In re Vina*, 283 B.R. 803, 807 (Bankr.M.D.Fla.2002).

[11][12] To find a false oath, courts should look for a pattern of omissions that appear to show fraudulent intent. *Id.* Moreover, courts have said that when considering the denial of a Debtor's discharge, the Bankruptcy Code should be "construed liberally in favor of the Debtor." *In re Walter*, 265 B.R. 753, 758 (Bankr.N.D.Ohio 2001), see also *American Bank v. Ireland (In re Ireland)*, 49 B.R. 269, 271 (Bankr.W.D.Mo.1985); *Peoples State Bank v. Drenckhahn (In re Drenckhahn)*, 77 B.R. 697, 705 (Bankr.D.Minn.1987).

This record does not establish fraudulent intent. Merely occupying the property for a short period of time is not enough \*191 to establish that property as a residence for the purposes of their schedules in bankruptcy. Therefore, this Court is satisfied that the Debtors did not commit a false oath by failing to list this property in Section 15 of their Statement of Financial Affairs and the Debtors are entitled to Judgment against GEMS in Count II and the claim of false oath should be dismissed with prejudice.

A separate final judgment shall be entered in accordance with the forgoing.

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