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U.S. BANKRUPTCY COURT
DISTRICT OF HAWAII
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UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re	)	Case No. 02-01329
	)	Chapter 7
CHARLES HUNT BALLARD,	)	
	)	
Debtor.	)	
	)	

ENTERED ON DOCKET
JUL 28 2003

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MOTION TO DISMISS CASE WITH PREJUDICE FOR "CAUSE" AND FOR "SUBSTANTIAL ABUSE"

On January 13, 2003, the Office of the United States Trustee ("OUST") filed a Motion to Dismiss Case With Prejudice For "Cause" And For "Substantial Abuse." Sixteen creditors filed statements in support of the motion. Debtor Charles Hunt Ballard ("Ballard") opposed the motion.

The initial hearing on the motion took place on March 19, 2003. At the hearing, I determined that there were disputed issues of material fact and that an evidentiary hearing was required. The evidentiary hearing was held on July 7 and 9, 2003. At both hearings, Curtis Ching, Esq., appeared on behalf of OUST, Lloyd Poelman, Esq., appeared on behalf of Ballard, and Ryther Barbin, Esq., appeared on behalf of Diane Shimabuku, who is a creditor.

Based on the evidence presented, the court makes the following:

FINDINGS OF FACT

1. Ballard is an osteopathic physician. He is highly educated, intelligent, and sophisticated. Ballard has practiced as a sole proprietor since August 2000. For several years before that, he was a shareholder in a group practice. From August 2000 until November 2001, he also operated a separate business called Vitality Medical Center. Ballard has been represented by counsel throughout this case. He had the assistance of an experienced business manager and has also consulted with at least two certified public accountants on tax and bookkeeping matters.

2. Ballard signed his bankruptcy petition, schedules of assets and liabilities, and statement of financial affairs on March 21, 2002. Those documents were filed in this court on April 9, 2002.

3. Ballard's schedules and statement of financial affairs contain numerous false statements.

a. In Schedule A, Real Property, Ballard represented that his residence was worth $303,200. He disclosed that this figure was equal to the tax assessed value of the property and attached a copy of the tax assessment to the schedule. He did not disclose that he paid $345,000 when he bought the property in 1997 or 1998. He did not disclose that, in May 2000, he had obtained an

appraisal that stated that the property was worth $355,000. He believed that the property was in fact worth about $355,000, not $303,200.

b. In Schedule B, Personal Property, item 1, he disclosed one checking account at Bank of Hawaii with a balance of $101 and a second checking account at City Bank with a balance of $1,500. In fact, on March 21, 2002, when Ballard signed the schedules, both balances were significantly higher ($2,975.25 and $2,506.47, respectively).[1] Ballard completely failed to disclose a City Bank credit card merchant account with a balance on the filing date of about $800.

c. In Schedule B, item 5, Ballard stated that he had no art objects or collectible coins. He did not disclose that he owns a collection of figurines, a Navajo rug, and a gold doubloon.

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[1] Ballard claims that the discrepancy is attributable to the fact that he listed the reconciled account balance, meaning the balance in the accounts after deducting all uncleared checks. Ballard's expert witness testified, however, that the figures listed in the schedule did not equal the reconciled account balances. Further, the schedules do not ask for the reconciled account balance, but rather the actual bank balance, because checks that have not cleared on the date of bankruptcy are not allowed to clear post-bankruptcy and instead are treated as unsecured claims.

d. In Schedule B, item 8, Ballard stated that he had no sports, photographic or other hobby equipment. He did not disclose that he owned skis, golf clubs, a digital camera, and woodworking tools.

e. In Schedule B, item 15, Ballard disclosed "long term accounts receivable (more than 90 days)" having a current market value of $1,000. He did not disclose that he also had about $11,000 of receivables that he considered "short term."

f. In Schedule B, item 28, Ballard stated that he had no animals. In fact, he owned two purebred dogs that were purchased in late 2001 for $1,000 each.

g. In Schedule C, Property Claimed As Exempt, Ballard claimed that all of his assets were exempt. Based on his disclosures, there was nothing available to pay unsecured claims. If he had completely and accurately disclosed his assets, however, there would have been funds available to unsecured creditors.

h. Schedule I, Current Income of Individual Debtor(s), requires debtors to list all sources of income, including "[r]egular income from operation of business or profession or farm (attach detailed statement)." Ballard listed $5,600 per month from this source. (Ballard failed to attach the detailed

statement of business income that Schedule I requires.) He admitted that this figure was inaccurate. In fact, he does not know how he arrived at this figure. Ballard claims that the correct figure is $4,449, based on his adjusted gross income reported in his 2001 tax return; however, OUST contends that it should be about $6,600, based on the average monthly amount that Ballard withdrew from his business account and deposited in his personal account (or more, because Ballard paid certain personal expenses, such as mortgage payments, out of the business account). The figure that Ballard listed was incorrect.

i. Ballard did not disclose that his office manager and her daughter were sharing his residence with him and were not paying rent to him. This omission made Schedules I and Schedule J, Current Expenditures of Individual Debtor(s), misleading because the schedules did not reveal that he was bearing the housing expenses of people who were not his dependents and who had the ability to pay their for own housing. The provision of free housing was also a gift that Ballard should have disclosed in response to question 7 of the statement of financial affairs.

j. Question 1 of the statement of financial affairs requires debtors to "[s]tate the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business," for

the year in which the petition is filed and the two preceding years. Ballard listed gross income of $18,444 for the year 2002 to the petition date, $92,301 for 2001, and $115,000 for 2000. The actual gross business receipts of his business for 2001 and 2002 were substantially higher, and the gross receipts for 2000 were slightly higher, than these figures. Ballard argues that he interpreted the question as asking for his gross business receipts less his business expenses. Even if this were a correct interpretation of the question (and it is not), the interpretation does not explain Ballard's answer. He admitted that, even using his definition, his answer is wrong. He could not have used the definition he now advocates when he answered the question. When he provided the information for 2000, he apparently used his gross receipts, because the amount of gross income he listed for that year ($115,000) was a few thousand dollars less than the total gross receipts listed on schedule C of his income tax return for that year. His responses for 2001 and 2002, however, do not match either his gross receipts, his business income less business expenses, his adjusted gross income for tax purposes, or any other underlying data. Ballard did not exercise diligence in preparing his answer to this question and was not sufficiently concerned with its accuracy.

k. Question 11 on the statement of financial affairs requires debtors to "[l]ist all financial accounts . . . which were closed, sold, or otherwise

transferred either absolutely or as security within one year." Ballard represented that he had not closed any bank accounts within a year before he filed his bankruptcy petition. Ballard admitted that this statement was false.

4. Ballard repeated these false representations at the first meeting of creditors, at which he testified under oath. He confirmed that all of the information contained in the schedules and statement of affairs was correct and that he had listed all of his assets. When the trustee began to ask specific questions, however, Ballard began to change his story. He did not volunteer any corrections to the information in his schedules and statement of affairs except in response to the trustee's questions. If the trustee and the creditors had not asked the right questions, Ballard's false statements would not have been revealed. In response to questioning, he disclosed the appraisal of his residence, the "short term" accounts receivable, the figurines, the Navajo rug, and the gold doubloon. In other respects, he confirmed the false statements in his schedules and statement of financial affairs. For example, he testified that the bank balances listed in the schedules were quite accurate. He promised to provide certain documents and to amend his schedules.

5. Ballard either knew that each of these statements was false or made them with reckless disregard for their accuracy. The court does not believe

Ballard's claim that all of the errors were inadvertent. This claim is not credible because the errors are numerous, obvious (from Ballard's perspective), and nearly all in favor of himself.

6. The facts that Ballard misrepresented were material. The schedules made it appear that there were no assets available for distribution to unsecured creditors and that his business was small. In reality, there are some assets available for administration and Ballard's business is of moderate size (in terms of gross income). Taken together, Ballard's false statements had an effect on the administration of the estate.

7. On July 5, 2002, Ballard sent the Trustee most of the documents that he agreed (at the meeting of creditors) to produce. The remaining documents were not produced until December 4 and 20, 2002. Ballard offered no evidence to explain this delay. Ballard sent copies of these documents to the attorneys for only two creditors.

8. Although Ballard promised to amend his schedules and statement of affairs at the meeting of creditors on May 28, 2002, he did not file the amendments until March 6, 2003, after OUST had filed its motion to dismiss. The amended schedules corrected some of the misstatements in the original schedules,

but not all of them. He still failed to disclose the third bank account, figurines, rug, skis, golf clubs, and gold doubloon.

CONCLUSIONS OF LAW

1. This motion to dismiss with prejudice for "cause" and for "substantial abuse" was brought pursuant to sections 707(a), 707(b), and § 349.[2]

2. Section 707(a) provides that "[t]he court may dismiss a case under this chapter only after notice and a hearing and only for cause, including– (1) unreasonable delay by the debtor that is prejudicial to creditors . . . [and] (3) failure of the debtor in a voluntary case to file . . . the information required by paragraph (1) of section 521."

3. Section 349(a) grants the court discretion to dismiss a case "with prejudice." In re Smith, 133 B.R. 467, 469 (Bankr. N.D. Ind. 1991). Section 349(a) provides, "[u]nless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed."

4. The dismissal of a bankruptcy case with prejudice prevents the debtor from ever obtaining a discharge of the debts existing at the time of the

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[2] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code 11 U.S.C. § §101 et seq. (West 2002).

dismissed case. Id. at 470. Thus, a dismissal with prejudice is, at the very least, tantamount to the denial of discharge due to the debtors' misconduct. See 11 U.S.C. § 727(a)(2)-(a)(7).

5. A dismissal with prejudice is clearly appropriate if the debtor is not entitled to a discharge under section 727. See In re Padilla, 222 F.3d 1184, 1191-1194 (9th Cir. 2000).

6. OUST bears the burden of proof. The preponderance of the evidence standard applies. Grogan v. Garner, 498 U.S. 279 (1991); In re Beauchamp, 236 B.R. 727, 730 (B.A.P. 9th Cir. 1999).

7. The bankruptcy system depends on accurate, complete, and voluntary disclosure by the debtor of all information required by the schedules and the statement of affairs. The debtor may lose the right to a discharge if the debtor makes an intentional false statement or omission in the debtor's schedules, In re Wills, 243 B.R. 58, 63 (B.A.P. 9th Cir. 1999), or gives false testimony at the meeting of creditors, In re Brenes, 261 B.R. 322, 334 (Bankr. D. Conn. 2001); In re Coombs, 193 B.R. 557, 563 (Bankr. S.D. Cal. 1996). See 11 U.S.C. § 727(a). The debtor's intent can be inferred from the circumstances and his course of conduct, including omissions from the schedules and from his testimony at the meeting of creditors. In re Wills, 243 B.R. at 64. A court may find the requisite

intent where there has been a pattern of falsity or where the debtor has displayed reckless indifference to or disregard of the truth. Id.

8. Ballard concedes that the schedules and the statement of affairs contain many errors but argues that the errors are not material. "Materiality is broadly defined." Id. at 62. "A false statement is material if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property." Id. In determining whether or not an omission is material, the issue is not merely the value of the omitted assets or whether the omission was detrimental to creditors. The court can deny a discharge under section 727 for concealing worthless or exempt assets. Id. at 63. Even if the debtor can show that the concealed assets were of little value or that a full and truthful answer would not have directly increased the estate, the debtor's discharge may be denied if the omission adversely affects the trustee's or creditors' ability to discover other assets or to investigate fully the debtor's pre-bankruptcy dealing and financial condition. Id.

9. Here, Ballard's misstatements and omissions from his schedules and statement of financial affairs were material in the aggregate, and in many instances individual misstatements and omissions were material.

a. Ballard understated the value of his residence. He disclosed the value of his residence as $303,200, based on the tax assessed value, even though he believed that the property was worth $355,000.

b. Ballard completely omitted other assets, such as the short term accounts receivable, the bank account, art objects and collectibles, purebred dogs, and hobby equipment. Omission of exempt assets can be material because the omission prevents investigation of the value and nature of the asset.

c. Ballard understated his income and gross receipts from his business, understated the balance of his bank accounts, and misrepresented his housing expenses.

10. Ballard's belated production of documents does not absolve Ballard from filing accurate schedules. Unlike the schedules, the documents produced were not filed in court and, therefore, were not available to all creditors. Further, the court will not permit a debtor to avoid the consequences of false statements in the schedules by producing a "haystack" of documents and daring the trustee to find the "needles" buried in it.

11. Similarly, Ballard's amended schedules do not excuse Ballard for his prior misstatements and omissions. Ballard cannot avoid the consequences of his misstatements and omissions by coming clean after he was unmasked. See

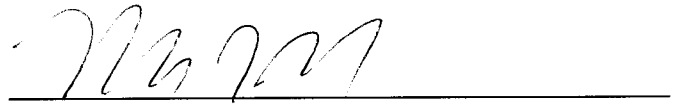
In re Beauchamp, 236 B.R. at 73. Further, the amended schedules still contained false statements and omissions. Finally, Ballard waited months to file the amended schedules. Ballard's stonewalling behavior is additional evidence of his intent to conceal his assets.

12. Pursuant to section 707(a) and 349(a), this case shall be dismissed for "cause" and "with prejudice."

13. The OUST seeks, in the alternative, for this case to be dismissed for "substantial abuse" pursuant to § 707(b). Section 707(b) provides, "After notice and a hearing, the court . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter." "Substantial abuse" exists where the debtor through his income has the ability to repay creditors over time. In re Kelly, 841 F.2d 908, 914 (9th Cir. 1988). Because this case is dismissed for cause pursuant to section 707(a) and with prejudice pursuant to section 349, the court need not decide whether "substantial abuse" exists in this case.

14. Accordingly, the court will enter an appropriate order granting the OUST's motion to dismiss for "cause" and "with prejudice."

Dated: Honolulu, Hawaii, JUL 27 2003.



Robert J. Faris
United States Bankruptcy Judge

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CERTIFICATION OF SERVICE
I HEREBY CERTIFY THAT THE ATTACHED
ORDER/JUDGMENT WAS MAILED ON
7/2/03, TO THE ABOVE
NAMED PARTIES IN INTEREST.

DEPUTY CLERK