

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:)	
)	Bankr. No. 02-50271
BILL MICHAEL KESSLOFF)	Chapter 7
Soc. Sec. No. 546-48-8393)	
)	
Debtor.)	
)	
KELVIN POPPEN and)	
ERNEST SCHLEUNING)	Adv. No. 02-5011
)	
Plaintiffs,)	
)	
-vs-)	DECISION RE: CROSS MOTIONS
)	FOR SUMMARY JUDGMENT
BILL MICHAEL KESSLOFF)	
)	
Defendant.)	

The matters before the Court are the parties' cross motions for summary judgments. The motions are core proceedings under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order and Judgment shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As discussed below, Plaintiffs' February 20, 2003, Motion for Summary Judgment will be granted and Debtor's discharge will be denied under 11 U.S.C. § 727(a)(4)(A).

I.

On April 22, 2002, Kelvin Poppen and Ernest Schleuning obtained a state court judgment against Bill M. Kessloff for \$64,601.50. The award was based on an arbitration award through the National Futures Association.

Kessloff ("Debtor") filed a Chapter 7 petition, schedules, and a statement of financial affairs on May 14, 2002. The only real property that Debtor listed was his homestead in Rapid City, South

Dakota. Debtor held \$33,475 in equity in his home, of which he declared only \$15,000 exempt. Debtor scheduled three secured creditors, one secured by his home and two others secured by a mobile home that he rents to others. Debtor scheduled only three unsecured creditors: Poppen and Schleuning for their judgment discussed above and Black Hills Federal Credit Union. He described the \$17,000 debt to the Credit Union as one on which he was a co-signer of a note given by Mountain Crown, Inc., of Littleton, Colorado. The description of this debt also referenced a 2000 Ford Explorer, although the claim was listed as unsecured. Debtor did not schedule any executory contracts or unexpired leases. He listed Mountain Crown, Inc., as a co-debtor to the Credit Union.

He scheduled his current income as \$1,289 per month: \$150 from wages, salary, or commissions; \$250 from real property income; and \$889 from Social Security. On his Schedule J, Debtor said his and his wife's combined income was \$2.25 less than their combined expenses of \$2,739.25.

On his statement of financial affairs, Debtor's answer to the question regarding his "[i]ncome other than from employment or operation of business" was difficult to decipher, though the form advised Debtor: "Give particulars." A lump sum of \$10,491.00 was listed for Social Security and a lump sum of \$12,000 was listed as "Rental." It was unclear if these sums were totals for one or two years and, if only for one year, which year. Debtor stated he had

not made any payments in excess of \$600 to a creditor within 90 days before his petition date. Debtor also stated that he had not made any transfers of property out of the ordinary course of his business within one year before his petition and that he did not have any losses within one year of his petition. He did not list any property that he held for another person.

Part "a." of the last question on the Statement of Financial, question 18., directed Debtor as follows, in pertinent part¹ [bold in original text]:

If the debtor is an individual, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the **six years** immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the **six years** immediately preceding the commencement of this case.

In response, Debtor checked the "None" box next to the question. Accordingly, other than references in his schedules to "Misc. stocks" valued at \$250, the mobile home rental property and some limited, unspecified income (current and in the two years prior to his petition), Debtor did not disclose any business interests that he had on the petition date or that he had in the six years before he filed bankruptcy.

¹ The last two parts of question 18.a. are applicable only to partnerships or corporations.

Poppen and Schleuning ("Plaintiffs") timely commenced an adversary proceeding against Debtor seeking a denial of his discharge or a declaration that their claim against Debtor is nondischargeable. Debtor answered with, essentially, a general denial.

Plaintiffs took Debtor's deposition on January 10, 2003.² At the deposition, Debtor testified that he and his wife owned and operated a corporate walnut orchard in California called Walnuts & Kessloffs, Inc.,³ ("Walnuts and Kessloffs") from 1979 until June 1997, when they sold the business but maintained the corporation. The corporation received net sale proceeds of \$476,356. Debtor testified that Walnuts and Kessloffs maintained its corporate status for about 27 months after the orchard was sold. Walnuts and Kessloffs had a bank account with Luther Burbank Savings in Santa Rosa, California, until December 20, 1999. The January 2000 statement showed that \$95,733.88 was removed from the account on December 20, 1999, and that the account was then closed. Debtor testified that Walnuts and Kessloffs might have had an account at Black Hills Federal Credit Union about this time and that the \$95,733.88 may have been transferred there, but he was not sure.

² After the conclusion of the deposition, Debtor reviewed the deposition and noted four changes. Three of the changes, however, were essentially changes or clarifications of his statements on record, not a correction of what he actually said at the deposition.

³ Some documents in the file indicate the correct corporate name may be Walnuts and Kessloff's, Inc.

Debtor also said that money may have been used for a contribution to OK Consultants, Inc. ("OK Consultants").

A December 31, 1999 statement from Black Hills Federal Credit Union presented by Plaintiffs at the deposition indicated that Walnuts and Kessloffs had three accounts in 1999: two draft accounts and one savings account. The savings account balance of \$25,577.16 was taken out December 17, 1999, and all three accounts were closed about the same time as the California account was closed.⁴ After that record was made at the deposition, Debtor agreed that the funds in Walnuts and Kessloffs' California account and its Black Hills savings account may both have funded a contribution made to OK Consultants.

Debtor testified that within the past six years he and his wife have been directors for OK Consultants. This corporation, Debtor stated at his deposition, was formed by Tony Gallegos in the latter part of 1999 and Debtor and his wife served as officers or directors "originally." Debtor said he was not employed by OK Consultants. He said he and Walnuts and Kessloffs had entered into a "contribution agreement" with Tony Gallegos, which was entitled "Memorandum of Understanding," and was dated October 3, 1999 by

⁴ The rate of return for the savings account in November 1999 was 4.76%. The statement indicated that \$2,542.46 in dividends had been paid to the account during 1999. Dividends paid to the account were not discussed at the deposition, but the total dividend paid indicates that the account at one time must have held significantly more than the \$25,577.16 that was withdrawn at the end of the year.

Tony Gallegos and October 7, 1999, by Debtor and his wife. The Memorandum of Understanding was technically between Tony Gallegos as Valley Tree Service as the "Proposer" and Walnuts and Kessloffs and Debtor and his wife as the "Contributor." Debtor, his wife, and Walnuts and Kessloffs pledged \$120,000 in funding for, as the Memorandum of Understanding described it, "a unique and speculative project" that required the large monetary contribution to "develop a structure for capital enhancement, while simultaneously creating a pool of capital to fund charitable needs." The Memorandum of Understanding further provided that OK Consultants would be formed, that Tony Gallegos would own 100% of the stock and would make all final decisions, and that 50% of any profits generated by March 1, 2002, by OK Consultants would be paid to Walnuts and Kessloffs.

Debtor stated at his deposition that they were unable to meet the total financial commitment contemplated by the Memorandum of Understanding so Walnuts and Kessloffs transferred title of a 1997 Ford F250 pickup to OK Consultants to "complete our contribution."⁵ That transfer was made on April 4, 2001, after Walnuts and Kessloffs had been dissolved. Debtor acknowledged that he was driving the pickup at the time of the transfer and he was still driving it at the time of the deposition. Debtor stated that he could not give any more specifics about OK Consultants' projects

⁵ Some of Debtor's deposition testimony left the impression that Debtor may have transferred funds in excess of \$120,000.00 to OK Consultants.

because he had to honor a confidentiality clause in the agreement.

That clause provided:

As part of this agreement, the contributor promises to proposer that ALL information pertaining to this agreement and any or all transactions, and the concept of the structure will be kept absolutely confidential and private. Contributor understands that this is a serious and enforceable mandate. As such, a perpetual guarantee and commitment exists from the date affixed hereon.

When questioned further about OK Consultants, Debtor specifically stated that neither he nor his wife was a stockholder of OK Consultants and that he did not work for or perform any services for OK Consultants. That testimony appeared to be contrary to one term of the agreement, which provided:

Contributor ... further agrees to devote 25% of each workweek, or as directed by the [Gallegos] during said time period, to any and all projects. For this effort, contributor shall be entitled to immediately access up to \$25,000 at any time following the initial minimum contribution.

Debtor also specifically stated that he had no control over OK Consultants. Debtor testified, "I'm not aware of any businesses that [OK Consultants] is engaged in or if it is engaged." Debtor also testified that they never received any profits or income from OK Consultants. Debtor further stated that he presently did not "really" have any contact with Tony Gallegos.

During his deposition testimony, Debtor acknowledged that the Memorandum of Understanding contained a withdrawal clause, as set forth above. Debtor's understanding of this provision was that he had a one-time option to withdraw \$25,000. Debtor stated he

exercised that option by withdrawing a sum less than \$25,000, but he did not know exactly when he withdrew it nor the exact sum that he took. Debtor stated he may have taken the withdrawal before Walnuts and Kessloffs transferred the pickup to OK Consultants. He did not acknowledge that any withdrawal was in exchange for services he performed, as the clause provides.

The Memorandum of Understanding indicated that an earlier \$45,000 note would be honored. The note attached to the Memorandum of Understand was dated October 5, 1997. The note provided that "[f]or value received" borrowers Walnuts and Kessloffs and Debtor and his wife would repay \$45,000 to Valley Tree Service by December 31, 1999. The \$45,000 included accumulated interest. A stamp on the note indicated it was paid in full on December 24, 1999.

Another business interest of his that Debtor disclosed during his deposition was Millennial Community Business Trust ("Millennial Trust"). He said this was a project mentioned in the Memorandum of Understanding with OK Consultants. He stated Millennial Trust was formed at the request of Tony Gallegos as a 501(c)(3) business trust in Nevada in November 2001. Its purpose was to "create a -- some capital to do some good humanitarian type of projects." He conceded that he and his wife were the only two managing partners. He said Millennial Trust had no assets and that it had not been involved in any business or other activity.

Debtor identified during his deposition a third business in which he has been involved. He said he and another gentleman attempted to get into the "microscopic blood analysis business." They called their enterprise "Imagine That." Debtor stated they did not receive any income from that business in the past couple years and that Debtor was no longer operating the business.

In addition to the businesses described above in which Debtor was involved, Debtor also testified that he has received in the past several years, and that he continues to receive, "residual commissions ... from health insurance sales" through Blue Cross Blue Shield of California. He said he stopped selling insurance when he moved to Rapid City, South Dakota, which was "five years this last August [2002]." Debtor said he also has been involved in commodities trading, for which he had a professional license, obtained in May 1996.

Debtor stated that he and his wife own a mobile home and the California real property on which it sets. He rents this property to others. He acknowledged that he failed to accurately schedule the California real property in his bankruptcy.

During the deposition, Debtor stated that he is now retired and earns only Social Security. He said his wife works as a medical transcriptionist and at "Traders Corner," and that in the recent past she also has done some billing part-time from their home. Later in his deposition, Debtor acknowledged that his 1998

federal income tax return showed that he earned \$8,500 in income from rent that he charged Walnuts and Kessloffs for storing the Ford pickup in his garage and for office space used in his home. He further acknowledged that Walnuts and Kessloffs was not engaged in any business at that time.

Debtor acknowledged that he received a loan of \$22,500 from Black Hills Federal Credit Union on March 29, 2001. The note indicated it was payable on May 3, 2001. Debtor said the purpose of the loan was to pay for living expenses. He also stated the credit union secured the loan by increasing its mortgage on his home. At the deposition, he was unable to specifically account for how the money was spent and he did not have contemporaneous checking and savings account records for this time period. A checking account statement for May 31, 2001, showed a balance of just over \$5,000.

Debtor discussed further an entry in his schedules regarding the debt with co-obligor Mountain Crown, Inc. Tony Gallegos, Debtor said, is the principal stockholder for Mountain Crown, Inc. Debtor said he cosigned the note for Mountain Crown, Inc., so that the corporation could take equity from a 2000 Ford Explorer that Tony Gallegos owned. Debtor said Mountain Crown, Inc., has been making the payments on the loan. Debtor did not recall when he cosigned this note.

During the deposition, Debtor stated he had invested \$6,000

with World Capital Resources of Canada in December 1999. He said World Capital Resources told him that they had a high yield investment program involving a major foundation in Europe. He stated his investment in this program was made through a cashier's check. He said World Capital Resources does not provide him with reports and that its people have "not been very communicative." He was unsure whether he would ever recover on this investment.

Debtor acknowledged that at one time he had an account with "Schwab the security house." A printout from Debtors' home computer accounting system regarding this account indicated a deposit of \$60,000 from "Luther MM" was received on July 12, 1998, a transfer of \$40,248.05 was made to Black Hills Federal Credit Union account on July 20, 1998, and a loan of \$21,765.25 was made to "IBC" on October 13, 1998. Debtor later identified IBC as the entity through which he purchased some foreign CDs. Debtor was unsure when the Schwab account was closed.

Debtor discussed at the deposition two certificated deposits that he made with Crown Meridian Bank in Granada. Two were for \$10,000 (one in September 1999 and the other in June 1999) and one was for \$15,000 (March 1999). Debtor said he was promised a high yielding return, but that the bank failed and he lost all the money. He said Price Waterhouse is the receiver for the failed bank.

Another failed investment that Debtor discussed at his

deposition was with IFR Trust. Debtor said Larry Wilcoxson, the man who controlled IFR Trust, is now in jail and that he (Debtor) had also lost his investment.

On January 21, 2003, following his deposition testimony, but more than eight months after he filed his original schedules, Debtor amended his schedules. To his schedule of real property, he added the real property in California on which his rental mobile home sets. The value he placed on the property had a typographical error. It read, "The property is worth approximately \$23,5140." Encumbrances were listed at \$102,100.00. Correspondingly, Debtor also amended his schedule of personal property to \$6,468.00 so that this value no longer included the real property value. Debtor amended his schedule of personal property to list his investment in OK Consultants, which he valued at \$1.00, an investment in "AG Gennoschaft through its agent World Capital Resources Investment," which he valued at \$1.00, and the certificates of deposit with Crown Meridan Bank, which he also valued at \$1.00. He did not state how many certificates he held from Crown Meridian Bank.

Debtor amended his schedule of exempt property. He listed the California property, but gave it a zero value, thus not exempting anything at all. *Soost v. NAH, Inc. (In re Soost)*, 262 B.R. 68, 71-74 (B.A.P. 8th Cir. 2001). He also declared exempt \$1.00 of his interests in OK Consultants, AG Gennoschaft, and the Crown Meridan Bank certificats of deposit, thus leaving any value in these assets

above \$1.00 as property of the bankruptcy estate. *Id.*; *Stoebner v. Wick (In re Wick)*, 276 F.3d 412, 417-18 (8th Cir. 2002) (the Bankruptcy Code and Rules do not oblige a trustee to object every time a debtor partially exempts an asset in order to preserve the estate's interest in that asset).

On January 21, 2003, Debtor amended his statement of financial affairs, question 18, to state the following:

Debtor was an officer and director of OK Consultants, Inc. of 8224 W. Ken Caryl Pl, #D, Littleton, CO 80126, Debtor had a joint venture agreement with OK Consultants, Inc., to develop a humanitarian investment scheme in foreign debentures.

Debtor was a co-trustee of the Millennium business trust, which is charitable business trust organized under the laws of the State of Nevada and tax exempt under 26 USC § 501(c)(3).

On January 27, 2003, Debtor again amended his statement of financial affairs, question 14, regarding property held for another. He now stated:

1997 Ford F250 pickup truck owned by OK Consultants, Inc. of 8224 W. Ken Caryl Pl. #D, Littleton, CO 80126. This truck is worth approximately \$10,895.00.

On February 13, 2003, Debtor moved for summary judgment on Plaintiffs' complaint. He challenged the arbitrators' decision and recited his version of the facts regarding his business relationship with Plaintiffs that lead to that decision. Debtor argued that Plaintiffs' claims could not be declared nondischargeable under § 523(a)(2)(A) because he had not personally received anything in value from Plaintiffs for the financial

services he had rendered for them and because Plaintiffs had not justifiably relied on Debtor's investment advice. As to the denial of discharge counts filed against him under § 727(a), Debtor stated he had not "materially or intentionally" falsified his bankruptcy schedules or concealed assets. He said he also had now amended his schedules to rectify any known inaccuracies. Debtor further argued that Plaintiffs had not put forth any evidence that he had transferred any property within one year of his petition so as to permit denial of his discharge under § 727(a)(2).

Debtor filed with his summary judgment motion a personal affidavit dated February 12, 2003. In the affidavit, he said he told his original bankruptcy attorney about the land and mobile home in California and that he now realized that the land should have been listed on his schedule of real property. Debtor also stated in his affidavit that his failure to list his position as a corporate officer and director and as the co-trustee of an inactive business was a "mere oversight." He gave the same excuse for not listing his possession of the "borrowed" vehicle from OK Consultants.

Debtor stated in his affidavit that he received his federal commodity trading advisor's license in 1997⁶. He then went on to again recite his version of his dealings with Plaintiffs.

Regarding the dissipation of the \$476,000 in proceeds from the

⁶ He had testified during his January 10, 2003, deposition that he received this license in May 1996.

sale of Walnuts and Kessloffs, Debtor now stated in this affidavit,

Much of this money was lost at the same time and in the same commodities trade that [Plaintiffs] lost their money. The balance was spent and has been all accounted for. The corporation made other investments, such as an investment in OK Consultants[,] Inc. This investment was made in October, 1999.

As to his involvement with OK Consultants in particular, Debtor now stated, in pertinent part, just a month after his deposition:

As part of my obligations in this joint venture, I deposited monies with OK Consultants Inc. The agreement allowed me to receive approximately \$25,000.00 of this money back for work done on the project. Just prior to the project being commenced, the sole shareholder in OK Consultants, Mr. Tony Gallegos became extremely ill. As a result I did the vast majority of the work on the project (I still work on the project today). The vast majority of investment monies were returned to me to meet my living expenses. Mr. Gallegos and I agreed that who ever [sic] worked on the project would be entitled to have his living expenses paid from the monies available. Because I have been actively working on the project and because I use the Ford F250 pickup while doing so, I have been able to retain possession of the Ford F250 pickup owned by OK Consultants Inc. and have done so since the transfer date of April 2001.

Plaintiffs filed two cross motions for summary judgment, one on February 19, 2003, regarding their § 523(a) nondischargeability counts and the second on February 20, 2003, regarding their § 727 denial of discharge counts. With respect to their nondischargeability count, Plaintiffs argued that the state court judgment must be given preclusive effect by the Bankruptcy Court since it was based on Debtor's fraud and misrepresentation. With respect to the denial of discharge count, Plaintiffs argued that the present record clearly shows that Debtor filed inaccurate and incomplete

schedules. Assets that Debtor omitted from his original schedules, which Plaintiffs identified in their motion, included the real property in California, Debtor's possession of the Ford pickup, and a \$6,000 investment in World Capital Resources. Inaccurate or incomplete answers on his statement of financial affairs cited by Plaintiffs included Debtor's total failure to list any of his prior business interests in the previous six years. Plaintiffs also argued that Debtor has failed to satisfactorily explain \$120,000 in cash that was transferred to OK Corporation.

On March 7, 2003, Debtor again amended question 18 of his statement of financial affairs to include his shareholder, officer, and director status with Walnuts and Kessloffs and his partner status in Imagine That. These business interests were not originally set forth in his statement of financial affairs. Debtor further stated that Imagine That was an "informal partnership" that began doing business in 1998 and ceased doing business in 1999.

With a brief filed March 10, 2003, Debtor filed an affidavit dated March 7, 2003. He admitted to "several inadvertent errors" in his bankruptcy schedules, but he again said that they were all attributable to "mere oversight." He also now said: that Walnuts and Kessloffs was dissolved in March 2000; that "[w]e invested approximately \$6,000.00" in Imagine That, which was used to purchase two microscopes and which are both now in the hands of others; that his health insurance agency "shut down" more than six

years ago so he did not have to list it on his statement of financial affairs⁷; and that he did not schedule his investments with Crown Meridan Bank, Imagine That, and AG Gennoschaft because he did not consider them to be assets, but instead considered them as total investment losses. Debtor further affied that he was unaware that he had to schedule property that he did not own but that he possessed. Finally, Debtor stated,

As indicated in my previous affidavit, approximately 90% of the monies invested in OK Consultants, Inc. were returned to me to satisfy my living expenses. The credit card payments delineated on the balance sheets provided by OK Consultants, Inc. are my credit cards, particularly the United Visa and Citibank Visa. Similarly, the MDU, City Finance (water bill), BH Power, US West, County Treasurer (property taxes), Physical Therapist Fees (Marsha Sebolt), BH Credit Union (house payments), Attorney fees and CPA Fees expenses denoted on those balance sheets are also part of my living expenses.

The balance sheets, based on Debtor's statements of which expenses were paid on his behalf, indicated that OK Consultants paid the following expenses to Debtor or on Debtor's behalf:

<u>November 1, 1999, through December 31, 2000</u>	
draw	\$17,200.00
credit cards	30,411.13
legal & CPA fees	5,609.50
physical therapist	1,112.50
mortgage	4,674.24
utilities	<u>3,387.32</u>
subtotal	\$62,394.69

⁷ That statement was contrary to his January 10, 2003, deposition testimony when he stated he had ceased selling insurance when he moved to Rapid City in 1997.

January 1, 2001, through December 31, 2001

credit cards	\$11,548.98
physical therapist	480.00
mortgage	3,325.40
utilities	<u>2,630.32</u>
subtotal	\$17,984.70

January 1, 2002, through December 31, 2002

credit cards	\$ 2,230.00
mortgage	594.14
utilities	<u>621.19</u>
subtotal	\$ 3,445.33

Total	<u>\$83,824.72</u>
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It does not appear that Debtor reflected any of the 2002 income on his Schedule J. He also did not disclose any of this 2000-2002 income in his statement of financial affairs although virtually all of it fit the description in questions 1 or 2.⁸

The balance sheets for OK Consultants to which Debtor referred in his March 7, 2003, affidavit were part of a large exhibit that was filed with his March 10, 2003, brief. This exhibit included a copy of a January 27, 2003, letter from Tony Gallegos to Debtor's attorney. Therein, Tony Gallegos said he would not waive the confidentiality agreement, apparently referring to the confidentiality clause in the Memorandum of Understanding regarding OK Consultants. Tony Gallegos also stated in his letter that "**no profits** were ever generated [bold in original]."

The exhibit to Debtor's March 10, 2003, brief further contained an October 14, 2002, letter from Debtor's counsel to

⁸ It is unknown whether any of it was reported on his federal income tax returns.

Dennis C. Whetzal, the case trustee for Debtor's main bankruptcy case. It stated in part,

As evidenced by the attached closing statement, [Debtor] realized \$476,356.32 of net sale proceeds [from Walnuts and Kessloffs]. Attached is a rough approximation of how these monies were expended.

The attachment set forth the following:

<u>Category</u>	<u>Amount</u>
Moving Expenses (Ca. To Rapid City)	10,000
Down Payment on Home in Rapid City	22,000
Garage construction at home in Rapid	25,000
Trading Losses	180,000
Taxes (Mostly State and Federal)	75,000
Investments: losses	
Crown Meridian Bank (bank failure)	35,000
Brycar Financial	7,500
IFR Trust	21,000
Blood Analysis business	10,000
Stock Market	5,000
Insurance premiums (blue cross and medical expenses)	24,000
Gifts	8,500
Loan Repayment	5,000
Travel	9,500
Education: computer, software, seminars, fees, supplies	12,000
Rental(mobile)Vandalism repairs, mortgage, sewer, sewer assessment	7,500
While not rented	
Accounting and legal fees (mediation prior to arbitration)	9,000
Car Purchases	8,200
Fuel, Maintenance	5,000
Living Expenses: mortgage, utilities	20,000
Total	\$499,200

This itemization was not made a part of the record at Debtor's January 10, 2003, deposition. At the deposition, Debtor had indicated that much of the proceeds from Walnuts and Kessloffs was invested in OK Consultants. Debtor's itemization does not reflect that investment. At most, it appears some of the expenses itemized above may have been paid with funds that Debtor may have deposited with OK Consultants.

II.

APPLICABLE LAW - SUMMARY JUDGMENT. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Bankr.P. 7056 and Fed.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein).

The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992) (quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986) (cites therein)). The non moving party is entitled to all reasonable inferences that can be drawn from the evidence without resorting to speculation. *P.H. v. School District of Kansas City, Missouri*, 265 F.3d 653, 658 (8th Cir. 2001) (quoting therein *Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1110 (8th Cir. 2001) (internal quotation omitted)). Only disputes over facts that might affect the outcome of the suit under the applicable law properly preclude the entry of summary judgment. *P.H. v. School District*, 265 F.3d at 658.

The movant meets his burden if he shows that the record does not contain a genuine issue of material fact and he identifies that

part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997) (quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273 (8th Cir. 1988)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (cite therein); *Handeen*, 112 F.3d at 1346. If the movant meets his burden, however, the non movant, to defeat the motion, "must advance *specific facts* to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (emphasis added) (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d at 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995)).

DENIAL OF DISCHARGE UNDER § 727(a)(4). A Chapter 7 debtor is entitled to a discharge of debts unless, among other things, the debtor knowingly or fraudulently, in a case or in connection with a case, makes a false oath or account. 11 U.S.C. § 727(a)(4)(A). The false oath or account must be material; that is, it must bear some relationship to the debtor's business transactions or to the bankruptcy estate or it must concern the discovery of assets, business dealings, or the existence and disposition of the debtor's

property. *Mertz v. Rott*, 955 F.2d 596, 598 (8th Cir. 1992) (citing *In re Olson*, 916 F.2d 481, 484 (8th Cir. 1990), and *In re Chalik*, 748 F.2d 616, 618 (11th Cir. 1984)).

Section 727(a)(4)(A) applies to a debtor's schedules and statement of financial affairs since they are signed under penalty of perjury, which has the force and effect of an oath. *Korte v. I.R.S. (In re Korte)*, 262 B.R. 464, 474 (B.A.P. 8th Cir. 2001) (cites and quotation therein). When it comes to the petition, schedules, and statement of financial affairs, these documents must be "accurate and reliable, without the necessity of digging out and conducting independent examinations to get the facts." *Mertz*, 955 F.2d at 598 (quoting *In re Mascolo*, 505 F.2d 274, 278 (1st Cir. 1974)). Even the omission of a fairly modest asset can warrant a denial of discharge if the omission was done with the requisite knowledge and intent. *Rasmussen v. Unruh (In re Unruh)*, 278 B.R. 796, 803 (Bankr. D. Minn. 2002) (quoting therein *Cepelak v. Sears (In re Sears)*, 246 B.R. 341, 347 (B.A.P. 8th Cir. 2000) (citing *Mertz*, 995 F.2d at 598)).

Section 727(a)(4)(A) provides a harsh penalty for the debtor who deliberately secretes information from the court, the trustee, and other parties in interest to his case. In doing so, it bolsters the basic functions of estate administration and adjudication in bankruptcy.

Sears, 246 B.R. at 347 (cites therein). Accordingly, the Bankruptcy Code, as § 727(a)(4)(A) makes clear, requires nothing

less than a full and complete disclosure of any and all apparent interest of any kind that a debtor may have. *Korte*, 262 B.R. at 474 (cites and quotations therein).

Since a debtor's state of mind at the time he signs his schedules and statement of financial affairs can rarely be known, the Court may look to circumstantial evidence to deduce whether any omissions were deliberate, *Weese v. Lambert (In re Lambert)*, 280 B.R. 463, 468 (Bankr. W.D. Mo. 2002), or made with reckless indifference. *Unruh*, 278 B.R. at 803.

The moving party must establish each element of § 727(a)(4) by a preponderance of the evidence. *Floret, L.L.C. v. Sendecky (In re Sendecky)*, 283 B.R. 760, 763 (B.A.P. 8th Cir. 2002). Once that showing is made, the burden of production may shift to the debtor. *Sears*, 246 B.R. at 348.

III.

Debtor himself has established the record regarding his false oath when he filed his original schedules. The record clearly shows that Debtor intentionally filed incomplete and inaccurate schedules and a statement of financial affairs. The omissions were both material and made with the requisite fraudulent intent or reckless indifference.

None of the several business interests that Debtor has had in the past few years were appropriately listed in his statement of

financial affairs, question 18.a. There is no conceivable way that a person of Debtor's claimed business expertise could not understand question 18.a. or forget that he and his wife owned a corporate walnut farm in California whose assets were sold within six years of his petition.

It is also not conceivable that Debtor could through "mere oversight" forget his deep and continued involvement with OK Consultants as a self-claimed investor, director, officer, and apparent employee. From his schedules to his most recent affidavit filed on March 10, 2003, Debtor's story about his relationship with OK Corporation and Tony Gallego has continually changed. None of it is reliable. Little of it is believable. In his schedules and statement of financial affairs, Debtor did not disclose at all the existence of OK Consultants and his significant ties to it. In his January 10, 2003, deposition, he stated the \$120,000 contribution to OK Consultants was a failed investment and that he did not directly work on OK Consultants' secret project. In his February 12, 2003, affidavit he stated that he actually took control of the OK Consultants' secret project and did the "vast majority" of the work on the project, that he still works on the project today, and that he was paid back nearly all his investment as compensation for his work. In his March 10, 2003, affidavit, Debtor acknowledged that he received back 90% of his contribution

to OK Consultants through the form of payment in his personal expenses, from credit card bills to utilities to his physical therapist, which an itemization he provided showed a total of at least \$83,824.70 being returned to him, in addition to the use of the Ford pickup. From this ever changing record, the Court can only conclude that Debtor never intended to tell the truth about OK Consultants on his original schedules and statement of financial affairs. Moreover, when the Court considers all of Debtor's statements and the available documentary evidence, the obvious conclusion is that OK Consultants was merely a corporation formed to hide Debtor's money from his creditors and that Debtor then used OK Consultants' bank account to pay his bills.

There are other major deficiencies in Debtor's original schedules and statement of financial affairs. Debtor failed to disclose his business interests in Millennial Trust and Imagine That. Debtor did not disclose that he still does work for OK Consultants. Debtor failed to accurately disclose the real property that he owned in California. He did list the Ford F250 pickup as property held by another. Debtor did not accurately disclose his income in the two calendar years preceding his petition since he omitted the cash and expenses that OK Consultants paid to him or on his behalf. Debtor did not disclose as an asset his entitlement to receive for a few more years commissions on

health insurance policies that he previously sold. Debtor did not disclose the several self-declared failed investments that he made in the past few years. Though he may have considered them valueless, he was still required to schedule each of them if the investment still existed on the petition date or he had to list on the statement of financial affairs any that were rendered a true loss within one year of the petition date.

A trial can produce nothing more that will aid Debtor's defense against Plaintiffs' denial of discharge complaint. Debtor has been given several opportunities to explain the failings in his original schedules and statement of financial affairs through pleadings, a lengthy deposition, briefs, and attendant affidavits. None are persuasive. None are consistent. None give the Court any indication that Debtor's omissions truly were inadvertent or immaterial. Accordingly, Debtor's discharge will be summarily denied under § 727(a)(4)(A).

Plaintiffs also alleged that Debtor has not sufficiently accounted for the \$22,500 in loan proceeds from Black Hills Credit Union that he received on March 29, 2001. The present record on that contention is not sufficient to support summary judgment under § 727(a)(5). Since Debtor's discharge will be denied under § 727(a)(4)(A), however, a trial on that issue is unnecessary.

It also appears that Debtor may have given incomplete or untruthful testimony during his January 10, 2003, deposition. Since the deposition was taken after Plaintiffs filed their complaint, the Court has not considered that issue herein. Debtor's bankruptcy case will be referred to the United States Attorney, however, for further investigation regarding the truthfulness of his deposition testimony and regarding possible bankruptcy fraud and federal income tax violations.

An appropriate order and judgment will be entered.

Dated this 25 day of April, 2003.

BY THE COURT:



Irvin N. Hoyt
Bankruptcy Judge

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

APR 25 2003

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota



(SEAL)

Charles L. Nail, Jr., Clerk

Attest
Deputy Clerk

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

APR 25 2003

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By AO

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