UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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January 21, 2004

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Subject: ***Van Leuven v. Holway***
(In re Robert Holway)
Adversary No. 03-5009
Chapter 7; Bankr. No. 03-50144

Dear Messrs. Utzman and Mairose:

The matter before the Court is Plaintiff Laleine Van Leuven's ("Van Leuven") motion for summary judgment. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I) and (J). This letter decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court will grant Van Leuven's motion and deny Debtor's discharge.

Summary. Van Leuven and Robert Holway ("Debtor") were married for 16 years. In 1999, Debtor and his son formed Video Blue, LLC ("Video Blue"), an adult-oriented business. Van Leuven and Debtor were divorced in April 2002.

Debtor filed for relief under chapter 7 of the bankruptcy code on March 24, 2003. He filed his schedules of assets and liabilities and his statement of financial affairs on that same date. Debtor listed Van Leuven as an unsecured creditor on his Schedule F.

On June 11, 2003, Van Leuven filed an adversary complaint, in which she asked the Court to deny Debtor's discharge pursuant to 11 U.S.C. §§ 727(a)(2) and (4) and to determine the dischargeability of certain marital debt and support obligations pursuant to 11 U.S.C. § 523(a)(5). On July 10, 2003, Debtor filed an answer to Van Leuven's complaint, in which he admitted alimony obligations were nondischargeable under 11 U.S.C. § 523(a) but denied Van Leuven was entitled to any other relief.

On November 19, 2003, Van Leuven filed a motion for summary judgment.[1] Van Leuven supported her motion with a memorandum and a number of exhibits, including the Honorable Thomas Trimble's April 3, 2002 Findings of Fact and Conclusions of Law in the parties' divorce proceeding and portions of Debtor's September 16, 2003 deposition in this case. On December 22, 2003, Debtor filed a memorandum in opposition to Van Leuven's motion. On December 23, 2003, Debtor filed an affidavit in support of his memorandum. On January 6, 2004, Van Leuven filed a reply brief, supported by a number of additional exhibits. The matter was taken under advisement.

In her complaint and her motion for summary judgment, Van Leuven makes a number of allegations in support of her claim that Debtor should be denied a discharge pursuant to 11 U.S.C. §§ 727(a)(2) and (4).[2] With respect to § 727(a)(2), Van Leuven alleges in her complaint that Debtor transferred certain vehicles

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[1] Van Leuven's motion was based only on § 11 U.S.C. 727(a)(2) and (4). She made no mention of 11 U.S.C. § 523(a)(5).

[2] In her motion, Van Leuven also argues Debtor should be denied a discharge under 11 U.S.C. § 727(a)(3) for his alleged failure to maintain Video Blue's corporate books and records. Debtor did not include that claim in her complaint. Therefore, it is not properly before the Court.

to his children and transferred or concealed other unspecified property. She alleges in her memorandum in support of her motion that Debtor concealed or transferred $9,800 he received from Video Blue. However, Van Leuven makes no mention of the vehicles in her motion, her memorandum, or her reply brief, and seems to have abandoned that issue, at least for the purposes of her motion. As for the $9,800, Van Leuven appears to argue in her reply brief that the Court should now consider Debtor's receipt of that sum in the context of § 727(a)(4) rather than § 727(a)(2).[3] The Court is thus left with Van Leuven's claim that Debtor should be denied a discharge pursuant to 11 U.S.C. § 727(a)(4).

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 Circ. 1992) (quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and citations therein). Where motive and intent are at issue, disposition of the matter by

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[3] To the extent that was not Van Leuven's intent, the Court notes that nothing in the record seems to contradict Debtor's testimony during his deposition that he lent Video Blue $9,800, that he was repaid at the rate of $250 per week, and that he received a final payment of $350 to $400 about the time he filed his chapter 7 petition. On its face, nothing about this business transaction leads the Court to believe Debtor concealed or transferred property with the requisite intent under § 727(a)(2).

summary judgment may be more difficult. *Cf. Amerinet*, 972 F.2d at 1490 (citation omitted).

The movant meets his burden if he shows the record does not contain a genuine issue of material fact and he points out 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) (citation 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 (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 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. A chapter 7 debtor is not entitled to a discharge if "the debtor knowingly and fraudulently, in or in connection with the case . . . made a false oath or account[.]" 11 U.S.C. § 727(a)(4)(A). "Statements made in schedules are signed under penalties of perjury and have 'the force and effect of oaths[.]'" *Korte v. United States of America Internal Revenue Service* (*In re Korte*), 262 B.R. 464, 474 (B.A.P. 8th Cir. 2001) (citations omitted).

For such a false oath to bar a debtor's discharge, it must be both material and made with intent. *See Mertz v. Rott* (*In re Mertz*), 955 F.2d 596, 598 (8th Circ. 1992); *Palatine National Bank*

of Palatine, Illinois v. Olson (*In re Olson*), 916 F.3d 481, 484 (8th Cir. 1990). A statement is material

> if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of [the debtor's] property.

In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984) (per curiam) (cited with approval in *Mertz*, 955 F.2d at 598, and *Olson*, 916 F.3d at 484).

As for intent, a debtor will rarely, if ever, admit he intended to deceive his creditors. Therefore, "[i]ntent 'can be established by circumstantial evidence,' and 'statements made with reckless indifference to the truth are regarded as intentionally false.'" *Korte*, 262 B.R. at 474 (citations omitted). *See also Keeney v. Smith* (*In re Keeney*), 227 F.3d 679, 686 (6th Cir. 2000) ("A reckless disregard as to whether a representation is true will also satisfy the intent requirement."); *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998) ("[N]ot caring whether some representation is true or false . . . is . . . the equivalent of knowing that the representation is false and material."). A pattern of false statements may also establish the requisite intent.

> Where the debtor has engaged in a pattern of omissions or committed numerous inaccuracies a presumption may be made that the debtor acted with fraudulent intent or acted with such reckless disregard for the truth as to be the equivalent of fraud.

Spencer v. Hatton (*In re Hatton*), 204 B.R. 470, 475 (Bankr. E.D. Va. 1996) (citation omitted).

The Debtor had an excuse as to each falsely answered

> question; either he didn't understand that the item had to be included since it was primarily the obligation of another or was of no real value to his estate.
>
> Individually, any one answer may have been the result of an innocent mistake. However, the cumulative effect of all the falsehoods together evidences a pattern of reckless and cavalier disregard for the truth serious enough to supply the necessary fraudulent intent required by § 727(a)(4).

Guardian Industrial Products, Inc. v. Diodati (*In re Diodati*), 9 B.R. 804, 808 (Bankr. D. Mass. 1981) (citation omitted). *See also Freedman v. Boone* (*In re Boone*), 236 B.R. 275, 280 (Bankr. M.D. Fla. 1999) ("[N]umerous omissions of assets may constitute a pattern demonstrating either an intentional false oath or a reckless disregard for the truth.") (citation omitted).

In her complaint and her memorandum in support of her motion for summary judgment, Van Leuven identifies several perceived deficiencies in Debtor's schedules and statements, including:

(1) Debtor's valuing his interest in Video Blue at $0.00 on Schedule B;
(2) Debtor's valuing his Wells Fargo checking account at $0.00 on Schedule B;
(3) Debtor's failure to schedule two golf carts on Schedule B; and
(4) Debtor's failure to fully disclose his gross income for 2001, 2002, and 2003 in his statement of financial affairs.

With respect to Debtor's interest in Video Blue, Debtor described that interest, under the column headed "Description and Location of Property," as "Membership in Video Blue, LLC - value

unknown $10,000 +."[4] Debtor argues in his brief that this "clearly indicates the existence of this asset was in excess of $10,000.00." The Court disagrees. What is clear is that Debtor valued his interest in Video Blue, under the column headed "Current Market Value of Debtor's Interest . . ." at "0.00." Given that valuation, the only reasonable interpretation of this entry is that Debtor valued Video Blue, LLC at "$10,000 +" and his interest in Video Blue at "0.00." Debtor's remaining arguments, *i.e.*, that he could not be expected to know the exact value of his interest, that his intent was clearly to surrender his interest, and that he had no way of knowing how a pending adult-oriented business ordinance might affect the value of his interest, focus on Debtor's decision to include "$10,000 +" in the description of his interest. Debtor has offered no explanation for his decision to value that interest at "0.00."[5] Debtor admits in his answer, his memorandum, and his affidavit that his interest was worth more than $10,000.00.[6] Thus, Debtor misstated the value of his interest in Video Blue.

With respect to Debtor's Wells Fargo checking account, Debtor also valued that interest, under the column headed "Current Market Value of Debtor's Interest . . ." at "0.00." In fact, Debtor had money in that account. He amended his Schedule B on December 22,

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[4] Debtor did not disclose the extent of his interest in Video Blue. Debtor owned 48% of the stock. Debtor's son owned the remaining 52%.

[5] Van Leuven offers a possible explanation. She argues in her reply brief that Debtor's purported good faith in dealing with Chapter 7 Trustee Dennis Whetzal is "largely illusory," because Debtor's son was the most logical buyer for Debtor's interest in Video Blue. Debtor's undervaluing that interest could therefore have directly benefitted his son, had Trustee Whetzal not had Debtor's interest independently appraised.

[6] Judge Trimble valued Debtor's interest in Video Blue at more than $72,000 less than a year before Debtor filed his chapter 7 petition.

2003 to show he had $162.34 in it on the day he filed his chapter 7 petition. Debtor argues in his brief that his failure to disclose the correct balance was merely negligent. The Court disagrees. The Court has no difficulty believing Debtor might not have known to the penny what he had in his checking account on the day he filed his chapter 7 petition. The Court cannot, and does not, believe Debtor did not know he had a balance. Moreover, Debtor could easily have determined that balance, had he chosen to do so. Instead, he waited almost nine months to amend his Schedule B to reflect the actual balance, long after "the cat was out of the bag." *Law Office of Larry A. Henning v. Mellor* (*In re Mellor*), 226 B.R. 451, 459 (D. Colo. 1998).

With respect to the golf carts, Debtor maintains that Video Blue owned them. This would appear to create a genuine issue of material fact regarding the ownership of those golf carts. However, Judge Trimble specifically found that Debtor and Van Leuven owned golf carts valued at $3,000. The Court does not know whether those are the same golf carts that Debtor now claims are owned by Video Blue. If they are, Debtor is estopped from disputing his ownership of them. *See SDDS, Inc. v. State of South Dakota*, 569 N.W.2d 289, 293-94 (S.D. 1997) (citing *Grand State Property, Inc. v. Woods, Fuller, et al.*, 556 N.W.2d 84, 87 (S.D. 1996) (citation omitted)). If they are not, then either Debtor should have listed them on his Schedule B, if he still owned them on the date he filed his chapter 7 petition, or he should have disclosed the transfer in his statement of financial affairs, if he gave them away,[7] lost them,[8] or otherwise transferred them[9] between

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[7] Question no. 7 on the statement of financial affairs requires a debtor to "[l]ist all gifts or charitable contributions made within **one year** immediately proceeding the commencement of [[the] case . . ." [Emphasis in original.]

[8] Question no. 8 on the statement of financial affairs requires a debtor to "[l]ist all losses from fire, theft, other

April 3, 2002, the date of Judge Trimble's Findings of Fact and Conclusions of Law, and March 24, 2003, the date on which Debtor filed his chapter 7 petition. Either way, Debtor should have accounted for those golf carts on his Schedule B or in his statement of financial affairs.

Finally, with respect to Debtor's gross income for 2001, 2002, and 2003, Debtor was asked in his Statement of Financial Affairs 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 from the beginning of this calendar year to the date this case was commenced [and] the gross amounts received during the **two years** immediately preceding this calendar year.

[Emphasis in original.] Debtor listed an amount of "-14,178.00" from "Wages from LLC" for "2001." He listed no income for 2002 or 2003. In fact, Debtor had income in 2002 and 2003. He amended his statement of financial affairs on December 22, 2003 to show he actually received income of $39,100 in 2001, $34,474 in 2002, and "at least" $11,888.60 in 2003 (through the date on which he filed his chapter 7 petition). Debtor argues that he did not feel the various sums paid by Video Blue to his creditors constituted income. However, on his Schedule I, Debtor listed $3,780.72 of

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casualty or gambling within **one year** immediately preceding the commencement of [the] case . . ." [Emphasis in original.]

[9] Question no. 10 on the statement of financial affairs requires a debtor to "[l]ist all other property, other than property transferred in the ordinary course of business or financial affairs of the debtor, transferred either absolutely or as security within **one year** immediately preceding the commencement of [the] case." [Emphasis in original.]

"Other monthly income," which he described as "Distribution from LLC." Debtor has offered no explanation of how those distributions could represent income for the purposes of his Schedule I but not his statement of financial affairs. Moreover, Debtor has offered no explanation for his initial failure to disclose any income for 2002 and 2003. Debtor should have disclosed his gross income for 2001, 2002, and 2003 on his original statement of financial affairs.[10] Instead, he waited almost nine months to amend his statement of financial affairs to reflect his gross income, again long after "the cat was out of the bag." *Id.*

When Debtor signed his schedules, he declared under penalty of perjury that he had read them and that they were true and correct to the best of his knowledge, information, and belief. When he signed his statement of financial affairs, he declared under penalty of perjury that he had read the answers contained in it and that they, too, were true and correct. However, Debtor misstated the value of his interest in Video Blue on his Schedule B; he misstated the balance of his Wells Fargo checking account on his Schedule B; he failed to account for his golf carts on his Schedule B or in his statement of financial affairs; and he failed to disclose his gross income for 2001, 2002, and 2003 on his statement of financial affairs. His declarations that his schedules and his statement of financial affairs were true and correct were therefore false. Thus, Debtor made two separate false oaths in and in connection with this case.

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[10] Given Debtor's failure to list his other income, the Court need not, and does not, decide whether the loan payments Debtor received from Video Blue constituted "income" within the meaning of question nos. 1 and 2 on the statement of financial affairs. The better practice, of course, would have been to list those payments. It is unlikely a debtor has ever been found to have acted with fraudulent intent for providing too much information.

Debtor's false oaths clearly bear a relationship to Debtor's business transactions and his bankruptcy estate and concern the discovery of assets, business dealings, and the existence and disposition of his property. Indeed, the Court can think of no other statement that would bear more directly on these matters. Debtor's statements were thus material.

Finally, the Court might have been willing to accept Debtor's explanation for any one of the foregoing misstatements or omissions. However, taken together, those misstatements and omissions constitute a pattern of reckless disregard for the accuracy of Debtor's schedules. Under the circumstances, the Court finds that Debtor acted with the requisite intent under § 727(a)(4)(A).

Conclusion. Debtor has failed to advance specific facts to create a genuine issue of material fact for trial. Van Leuven is entitled to judgment as a matter of law. Her motion for summary judgment will therefore be granted.[11] The Court will enter an appropriate order.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

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.

JAN 21 2004

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

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
JAN 21 2004
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

INH:sh

cc: adversary file (docket original in adversary; service copies on counsel)

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[11] The Court's decision to deny Debtor's discharge renders moot Van Leuven's request for relief under 11 U.S.C. § 523(a)(5).

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