

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
Western Division

In re:	)	Bankr. No. 91-50357
EDWARD A. KUMLEY	)	Chapter 7
f/d/b/a Kelco Readers	)	
f/d/b/a Black Hills Readers	)	
f/d/b/a E and L Enterprises	)	
Soc. Sec. No. [REDACTED]-0668	)	
	)	
and	)	
	)	
LEESA IRENE KUMLEY	)	
Soc. Sec. No. [REDACTED]-5762	)	
Debtors.	)	
	)	
DENNIS C. WHETZAL, TRUSTEE	)	Adv. No. 98-5003
Plaintiff,	)	
-vs-	)	MEMORANDUM OF DECISION RE:
	)	REVOCATION OF DISCHARGE
	)	
EDWARD A. KUMLEY and	)	
LEESA IRENE KUMLEY	)	
Defendants.	)	

The matter before the Court is a complaint to revoke discharge. The matter was submitted on stipulated facts and briefs. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions. As set forth below, the Court concludes that Debtors' discharge must be revoked.

I.

The parties' stipulated facts filed March 24, 1998 are incorporated herein by reference. In addition, Debtors amended their schedules following conversion of their case to Chapter 13 to disclose that one day prior to their petition, Debtors received

14.

\$36,315.26 in law suit proceeds arising from a traffic accident in which Leesa Kumley's mother was killed.

II.

Under 11 U.S.C. § 727(d)(2), a Chapter 7 debtor's discharge order must be revoked if the debtor knowingly and fraudulently failed to disclose property of the bankruptcy estate. A request to revoke a debtor's discharge under § 727(d)(2) must be made before the later of one year after the discharge order is granted or the date the case is closed. 11 U.S.C. § 727(e).

III.

TIMELINESS OF REVOCATION COMPLAINT. Debtors do not dispute that they initially concealed the law suit proceeds and failed to turn them over to Trustee Whetzal as he had requested. They argue, however, that the Trustee's complaint is untimely because more than one year has elapsed since their discharge was entered.

Debtors' defense is without merit.<sup>1</sup> Section 727(e) clearly

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<sup>1</sup> Had Debtors' fraudulent actions not encompassed concealment of property of the estate and failure to turn it over, the Trustee's complaint may have been time barred. Section 727(d)(1) permits revocation of a discharge if it was obtained through fraud only if the fraud was not known by the plaintiff before a discharge was entered. See *Mid-Tech Consulting, Inc. v. Swendra*, 938 F.2d 885 (8th Cir. 1991). There is no dispute that Trustee Whetzal knew Debtor's initial schedules and § 341 meeting testimony were fraudulent before they received their Chapter 7 discharge. However, Debtors' fraudulent concealment of property of the estate also falls under the more specific subsection (d)(2). Under § 727(d)(2) -- fraud based on the concealment of property of the

provides that the complaint under § 727(d)(2)<sup>2</sup> may be brought before the later of one year after the discharge is entered or before the case is closed. Here, the case is not closed so Trustee Whetzal is still within the statutory time allowed. *Miller v. Kasden (In re Kasden)*, 209 B.R. 239, 242 n. 3 (8th Cir. B.A.P. 1997).

APPLICATION OF LACHES. Debtors also argue that Trustee Whetzal is estopped by laches because Trustee Whetzal could have either filed a complaint seeking denial of discharge or seeking revocation of the discharge much sooner. This argument is also without merit.<sup>3</sup> A complaint seeking revocation of discharge under § 727(d)(2) is an action at law for which an express federal statute of limitations has been set. See 11 U.S.C. § 727(e). Accordingly, a laches defense does not apply. *Ashley v. Royle's*

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estate or failure to turnover property of the estate -- there is no statute of limitation based on the plaintiff's pre-discharge knowledge of the fraud as there is in § 727(d)(1).

<sup>2</sup> Of the several cases cited by Debtors regarding the one year limitation, the discussion in each centers on § 727(d)(1). One case, *Miller-Claborn Distribution Co. v. Richard (In re Richard)*, 165 B.R. 642 (Bankr. W.D. Ark. 1994), discusses § 727(d)(2) but only in the context of a finding that it did not apply because the debtors were forthcoming regarding the unscheduled property.

<sup>3</sup> None of the cases Debtors cited discussed laches in the context of § 727(d)(2).

*Famous Corned Beef Co.*, 66 F.3d 164, 169-70 (8th Cir. 1995). Further, while Debtors were making restitution for the funds that should have been included in the bankruptcy estate, the Trustee had little motive to seek a revocation of discharge and Debtors had no expectation that he would. Thus, Debtors cannot prove all elements necessary for laches to apply. See *F.D.I.C. v. Nordbrock*, 102 F.3d 335, 339-40 (8th Cir. 1996).

APPLICATION OF § 727(d)(2). Section 727(d)(2) provides that a court shall revoke a debtor's discharge upon a trustee's request if

the debtor acquired property that is property of the estate, or become entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee[.]

In this case, Debtors disclosed the law suit proceeds when they converted their case to a Chapter 13. However, it is undisputed that Debtors fraudulently failed to disclose the law suit proceeds in their original schedules and at the § 341 meeting. Accordingly, the Court finds that the grounds for revoking discharge under § 727(d)(2) have been established. Compare *Miller-Claborn Distribution Co. v. Richard (In re Richard)*, 165 B.R. 642, 644 (Bankr. W.D. Ark. 1994) (debtor testified truthfully at the § 341 meeting). Section 727(d)(2) does not contemplate that a revocation of discharge due to the concealment of property of the estate can

be avoided or mitigated through the satisfaction of a restitution order or another repentant act, such as amending schedules, once that basis for revocation has been proven. See *In re Bates*, 211 B.R. 338 (Bankr. D. Minn. 1997) (discussion of when a pre-trial settlement of a revocation of discharge complaint can be approved).

An order revoking Debtors' discharge shall be entered.

Dated this 10<sup>th</sup> day of June, 1998.

BY THE COURT:

  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:  
Charles L. Nail, Jr., Clerk

By:   
Deputy Clerk



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

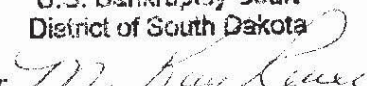
**JUN 10 1998**

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

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.

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

By:   
Date: 6-10-98

Case: 98-05003 Form id: 122 Ntc Date: 06/10/98 Off: 3 Page: 1  
Total notices mailed: 2

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